SUBJECT INDEX TO BRIEF.

PAGE

I. The Opinions of the Courts Below 1

II. Jurisdiction 2

III. Statement of the Case 2

IV. Specification of Errors 5

V. Federal Statute Involved 6

VI. Summary of Argument 6

VII. Argument 8

1. The Circuit Court of Appeals erred in holding that Section 204, subdivision (a), of the Transportation Act of 1920, does not include petitioner within its terms 8

a. In construing Section 204, the Circuit Court of Appeals erred in not giving to the word "deficit" its accepted use and meaning 15

b. In construing Section 204, effect should have been given to the intent of Congress as shown by the Congressional Record 26

c. By reason of the known mischief to be remedied, which was actual decrease of income to petitioner and other railroads similarly situated on account of diversion of traffic and other disabilities under which they labored during the Federal control period, Section 204 should have received in any event a liberal construction 30

d. The history of this and similar acts relating to railroads during the war period and subsequent thereto is a proper aid to the correct construction of Section 204 35

e. Any other construction of Section 204 than that of the Interstate Commerce Commission in *Construction of the Word "Deficit"*, 66 I. C. C. 725, in accordance with which petitioner was reimbursed, results in discrimination and injustice 39

2. The Interstate Commerce Commission was vested by Sections 204 and 212 with power and jurisdiction to interpret the law and determine the facts.

The exercise of this jurisdiction was not an exertion of a power delegated to the Interstate Commerce Commission as such.

The rule in *Work* v. *Rives*, 267 U. S. 175, should be applied herein 44

3. The decision of the Interstate Commerce Commission awarding reimbursement to petitioner was and is final and conclusive.

It cannot be reopened, reviewed, reversed, or set aside, there being no such concurrent or subsequent authorization by Act of Congress 52

4. The Interstate Commerce Commission had no power to rescind and set aside its award of reimbursement—*A fortiori*, it has no such power after its personnel had been changed 69

5. The reimbursement paid to petitioner was in no sense a subsidy or bonus, and the Government has no other or better right than any individual to reclaim the same.

The money *ex aequo et bono* belongs to petitioner 71

6. The payment of the money to petitioner was the result of a compromise and settlement 80

Conclusion 87

TABLE OF CASES, TEXTBOOKS AND STATUTES CITED

CASES

	PAGE
Atlantic Cleaners & Dyers *v.* United States, 286 U. S. 427	25
Atlantic Coast Line R. Co. *v.* Schirmer, 69 S. E. (S. C.) 439	78
Beley *v.* Naphtaly, 169 U. S. 353	35
Borough of Mt. Union *v.* Kunz, 139 Atl. (Pa.) 118	78
Butte, Anaconda & Pacific Ry. Co. *v.* United States, 61 Fed. (2d) 587	1, 4, 23, 40, 42, 43, 52, 66, 67, 71, 73, 75, 80
City of St. Louis *v.* United States, 92 U. S. 462	86
Construction of the Word "Deficit", 66 I. C. C. 765	3, 39, 44, 62, 70
Continental Tie and Lumber Co. *v.* United States, 286 U. S. 290	24, 31, 39, 58, 59, 74, 75, 79
Costanzo *v.* Tillinghast, 287 U. S. 341, 53 S. Ct. 152	22
Crowell *v.* Benson, 285 U. S. 22	67, 68
Deficit Settlement with Butte, Anaconda & Pacific Railway, 94 I. C. C. 617	2, 3, 70
Deficit Settlement with Butte, Anaconda & Pacific Railway, 117 I. C. C. 780	2, 3, 70
Deficit Status of Bingham & Garfield Railway Co., 99 I. C. C. 724	3, 38, 70
D'Olier Engineering Co. *v.* United States, 244 Fed. 90	84, 85
Early Foster Co. *v.* Gottlieb, 214 S. W. (Tex.) 520	17
Francis Palms Co., *et al.*, 7 Land Decisions 147	70
General Investment Co. *v.* N. Y. C. R. R., 271 U. S. 228	62
Great Northern Ry. Co. *v.* United States, 277 U. S. 172	45, 46, 54, 55, 63, 67, 68
Grifenhagen *v.* Ordway, 218 N. Y. 481	70
Hawaii *v.* Mankichi, 190 U. S. 197	41
Hilborn *v.* United States, 27 Ct. of Claims, 547 (aff'd 163 U. S. 342)	80
Ickes, Secretary *v.* United States, *ex rel.* Chestatee P. & C. Corp., 53 S. Ct. 700	50
In re Village of Plattsburg, 50 N. Y. Supp. 356	17
Interstate Commerce Commission *v.* Alabama Midland Ry. Co., 168 U. S. 144	25
Interstate Commerce Commission *v.* Ill. Cent. R. R., 215 U. S. 452	67
Interstate Commerce Commission *v.* Union Pacific R. R., 222 U. S. 541	67
Johnson *v.* Southern Pacific, 196 U. S. 1	34
Kiefer Oil & Gas Co. *v.* McDougal, 229 Fed. 933	83
Knowlton *v.* Moore, 178 U. S. 41	22
Mason *v.* United States, 84 U. S. 67	86
McKnight *v.* United States, 98 U. S. 179	72
Mutual Loan & Bldg. Assn. *v.* Price, 19 Fla. 127	17

PAGE

N. Y. & M. P. L. R. *v.* Winans, 58 U. S. 30 70

Northern Pacific Ry. Co. *v.* Interstate Commerce Commission, 23 Fed. (2d) 221 (Certiorari denied, 275 U. S. 572) 35, 66

Piedmont & N. R. Co. *v.* Interstate Commerce Commission, 286 U. S. 299 ..... 40, 42

Plumstead Board of Works *v.* Spackman, L. R., 13 Q. B. D. 878 41

Southern Pacific Co. *v.* Interstate Commerce Commission, 219 U. S. 433 67

Standard Steel Car Co. *v.* United States, 60 Court of Claims 726 ..... 84, 86

Tagg Bros. & Moorehead *v.* United States, 280 U. S. 420 ..... 67, 69

Texas & Pac. Ry. Co. *v.* United States, 286 U. S. 285 74

United States *v.* Adams, 74 U. S. 463 86

United States *v.* Arredondo, 6 Peters, 691 ..... 51, 60

United States *v.* Atlanta B. & C. R. Co., 282 U. S. 522 54

United States *v.* Butte, Anaconda & Pacific Ry. Co., 38 Fed. (2d) 871 ..... 1, 4, 23

United States *v.* California & Oregon Land Co., 148 U. S. 31 64

United States *v.* Child & Co., 79 U. S. 232 86

United States *v.* Choteau, 102 U. S. 603 86

United States *v.* Ferriera, 13 Howard (54 U. S.) 39 ..... 50, 57

United States *v.* Fisher, 2 Cranch 358 40

United States *v.* Great Northern Ry. Co., 287 U. S. 144, 53 S. Ct. 28 ..... 10, 36, 49, 55, 56, 58, 60, 63, 71

United States *v.* Hill, 120 U. S. 169 72

United States *v.* Justice, 81 U. S. 535 ..... 80, 86

United States *v.* Katz, 271 U. S. 354 22

United States *v.* Kirby, 7 Wall. 482 41

United States *v.* Koplin, 24 Fed. (2d) 840 86

United States *v.* Moser, 266 U. S. 236 64

United States *v.* Wildcat, 244 U. S. 111 63

United States *ex rel.* Abilene etc. Ry. Co. *v.* Interstate Commerce Commission, 8 Fed. (2d) 901; (Certiorari denied, 270 U. S. 650) 65

United States *ex rel.* Cripple Creek & Colorado Springs Railroad Co. *v.* Interstate Commerce Commission, 11 Fed. (2d) 554; (Certiorari denied 273 U. S. 706) 24, 65

United States *ex rel.* Empire & S. E. Ry. Co. *v.* Interstate Commerce Commission, 45 Fed. (2d) 293; (Certiorari denied, 283 U. S. 834) 65

Walker *v.* United States, 139 Fed. 409; (aff'd 148 Fed. 1022) 78

Walling *v.* Brown, 76 Pac. (Idaho) 318 70

Wells *v.* Nichols, 104 U. S. 444 86

Westbrook *v.* Director General, 263 Fed. 211 18

Wilbur, Secretary, *v.* United States *ex rel.* Chestatee P. & C. Corporation, 53 S. Ct. 293 50

Wilbur, Secretary, *v.* United States *ex rel.* Vindicator Consolidated Gold Mining Co., 284 U. S. 231 ..... 49, 51

Wisconsin Central Ry. *v.* United States, 164 U. S. 190 ..... 53, 56

Work *v.* Chestatee Co., 267 U. S. 185 ..... 48, 50

Work *v.* Rives, 267 U. S. 175 ..... 44, 48, 49, 50, 51, 53, 57, 61, 66, 71

Wyandotte Terminal R. R. Co. *v.* United States, 64 Court of Claims 328; (Certiorari denied, 276 U. S. 630) 65

Textbooks

PAGE

Keener on Quasi-Contracts, page 67 76
Parsons on Contracts, Ninth Edition, Vol. 1, p. 477 ..... 82, 83

Statutes

Dent Act (War Minerals Relief Act) (Chap. 94, 40 Stat. 1272) 46, 47, 83
Sections 1, 2, 3, 4 46
Section 5 ..... 47, 48
Amended (45 Stat. 1166) 49

Federal Control Act (Act of March 21, 1918; C. 25, 40 Stat. 451) 10, 12, 14, 15
Section 1 ..... 31, 33, 36, 37
Section 14 ..... 32, 33

Federal Income Tax Law 59, 75

Interstate Commerce Act 45

Judicial Code, Section 240 (a) as amended by Act of February 13th, 1925 (C. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A., Sec. 347 (a)) 2

Longshoremen's and Harbor Workers Compensation Act (C. 509, 44 Stat. 1424) 68
Section 21 69

Packers' and Stockyards' Act (C. 64, 42 Stat. 163) 69
Section 316 69

Safety Appliance Act 34
Sherman Anti-Trust Act 25

Transportation Act of 1920 (Chap. 91, 41 Stat. 460) 12, 14, 15, 71
Section 200 37
Section 202 37
Section 204 ..... 6, 18, 19, 20, 21, 22, 26, 30, 31, 34, 35, 36, 37, 38, 39, 41, 44, 45, 49, 56, 59, 60, 67, 68, 69, 74
Section 204 (a) 17, 18, 19, 23, 26, 41
Section 204 (b) 19, 36
Section 204 (c) 19
Section 204 (d) 19, 20, 21
Section 204 (e) 19, 20, 21
Section 204 (f) 20, 21, 40
Section 204 (g) 21
Section 209 ..... 36, 37, 38, 39, 45, 49, 54, 55, 56, 60, 74
Section 212 (Chap. 72, 41 Stat. 1145) 6, 37, 44, 49, 55, 56
Section 212 (a) 49, 55, 56, 71

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 768

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF OF PETITIONER, BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, A CORPORATION, ON THE MERITS.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, rendered on November 7th, 1932, is reported at 61 Federal (2d) page 587, and is printed in the record at pages 82 to 94, inclusive.

The opinion of the District Court for the District of Montana, overruling demurrer to complaint, rendered on February 26th, 1930, is reported at 38 Federal (2d) page 871, and is printed in the record at pages 10 to 17, inclusive.

The opinion of the District Court for the District of

Montana, on demurrer to answer, rendered on May 31st, 1930, is printed in the record at pages 37 to 40, inclusive.

The decision of the Interstate Commerce Commission certifying petitioner's claim is reported in 94 I. C. C. 617, and the decision of the Commission vacating and setting aside petitioner's certificate is reported in 117 I. C. C. 780.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925 (C. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A., Section 347 (a)).

2. The date of the judgment to be reviewed is November 7th, 1932 (R. 95). Petition for rehearing was filed with the Clerk of the Circuit Court of Appeals for the Ninth Circuit on December 6th, 1932, and within thirty (30) days after the judgment was rendered, as provided by Rule 29 of the Rules of the Circuit Court of Appeals for the Ninth Circuit, and the petition for rehearing was denied on January 16th, 1933 (R. 96).

3. Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit was granted on April 17th, 1933 (R. 101).

III.

STATEMENT OF THE CASE.

The petitioner is a shortline carrier whose road was in the possession and control of the United States and operated by the Director General of Railroads from Janu-

ary 1st, 1918, to September 27th, 1918, when it was relinquished, and thereafter, throughout the remainder of the period of Federal control, it was operated by the petitioner.

In a proceeding before the Interstate Commerce Commission, under the provisions of Sections 204 and 212 of the Transportation Act of 1920, entitled "Reimbursement of Deficits During Federal Control" (Appendix hereto, page 22), petitioner filed its return with the Commission showing a net credit of $600,527.35.

Thereafter, the Commission determined the amount due petitioner to be $487,116.31, and that amount was offered to the petitioner on condition that it sign a release accepting said amount "in settlement of all claims against the government under said Section 204" (R. 44-46). See *Deficit Settlement with Butte, Anaconda & Pacific Railway*, 94 I. C. C. 617; decided March 20th, 1925 (R. 47-49). This amount was certified to the Treasurer of the United States and paid in full to petitioner on March 26th, 1925 (R. 26). The Commission made this award and settlement in accordance with the interpretation of Section 204 in *Construction of the Word "Deficit"*, 66 I. C. C. 765, decided February 9th, 1922. The Commission later, after a change in its personnel, reconsidered its said interpretation of Section 204 in the case of *Deficit Status of Bingham & Garfield Railway Co.*, 99 I. C. C. 724, decided October 17th, 1925, and thereafter attempted to reverse its decision and award and rescind its settlement with petitioner, over objection of petitioner, appearing specially, that it had no power to do so. (*Deficit Settlement with Butte, Anaconda & Pacific Railway*, 117 I. C. C. 780, decided March 7th, 1927.) On the 8th day of June, 1928, repayment was demanded by the Secretary of the Treasury of petitioner and refused (R. 6).

On August 23rd, 1929, the Government commenced this proceeding, by complaint as for money had and received, to recover said sum of $487,116.31, together with lawful interest from demand, and costs (R. 2), alleging in substance the various proceedings had as above outlined. The gist of the action is that the construction placed by the Commission upon the word "deficit" (66 I. C. C. 765) was an erroneous and unwarranted construction and not in harmony with the accepted use of said word or of its use as found elsewhere in said Transportation Act (R. 5). Demurrer was filed to said complaint (R. 8), which was overruled by the District Court (R.9), (38 Fed. (2d) 871), after which answer (R. 17), demurrer thereto (R. 34), overruled in part and sustained in part by the District Court (R. 37), and amended answer (containing affirmative defenses, first, compromise and settlement hereinbefore mentioned, second, certain equities in favor of the petitioner, and third, change in personnel of the Commission between the dates of its interpretations of Section 204 hereinbefore mentioned) (R. 40), were filed. Motion for judgment on the pleadings by the Government (R. 57) was granted by the District Court (R. 58), and judgment entered thereon (R. 60). Thereafter an appeal was allowed to the Circuit Court of Appeals for the Ninth Circuit (R. 66), and, on appeal, the judgment of the District Court was affirmed (R. 95). (Opinion, R. 82-94, 61 Fed. (2d) 587.) Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit was granted by this Court on April 17th, 1933 (R. 101).

The pleadings show that the petitioner, after having been relinquished by the Director General, sustained a deficit in railway operating income in its own operations during the Federal control period as compared with its test period operations, but that its railway operating in-

come exceeded its railway operating expenses during the Federal control period.

The Circuit Court of Appeals determined that the petitioner did not come within the terms of Section 204, subdivision (a), defining carriers, standing alone, or construed in connection with the other subdivisions of Section 204, because it did not, on the face of the pleadings, sustain a loss in its railway operating income during the Federal control period, although it suffered a decrease of $487,116.31 therein, as compared to the test period, that the decision of the Interstate Commerce Commission was not final and binding on the court, that there were no equities in favor of petitioner, and that no binding compromise or settlement was effected.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in affirming the order of the District Court overruling petitioner's demurrer to the complaint of the United States of America.

2. The Circuit Court of Appeals erred in affirming the order of the District Court sustaining the motion of the United States of America for judgment on the pleadings and ordering judgment in favor of the United States of America, and against the petitioner.

3. The Circuit Court of Appeals erred in finding and holding that there was no error in the judgment of the District Court entitling petitioner to a reversal, and in affirming said judgment.

V.

FEDERAL STATUTE INVOLVED.

This case involves the construction of Sections 204 (Feb. 28, 1920, C. 91, Sec. 204, 41 Stat. 460, 49 U. S. C. A. Sec. 73.) and 212 (Feb. 26, 1921, C. 72, 41 Stat. 1145, 49 U. S. C. A. Sec. 79.) of the Transportation Act of 1920, set out in the appendix hereto on pages 22 and 32.

VI.

SUMMARY OF ARGUMENT.

1. That the construction of Section 204 by the Interstate Commerce Commission by virtue of which petitioner was reimbursed was and is correct as carrying out the intention of the Congress and as a liberal interpretation of the Transportation Act, declared to be remedial by this Court. The phrase in subdivision (a) of Section 204, defines a carrier within the section as one which "sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation". This definition must include a carrier which sustained a decrease or falling off in railway operating income during the Federal control period as compared to the railway operating income during the test period because; (a) it is the correct definition of the word "deficit" itself; (b) it accords with the intent of the Congress as shown by the Congressional Record; (c) it remedies the known mischief, which was actual loss of income to petitioner and other railroads similarly situated on account of diversion of traffic and other disabilities under which they labored during the Federal control period; (d) it accords with the history of this and similar acts relating to railroads dur-

ing the war period and subsequent thereto; and, (e) because any other construction would result in discrimination and injustice.

2. That Sections 204 and 212, assuming but not conceding an erroneous and unwarranted construction thereof, which included petitioner, vest the Interstate Commerce Commission with sole, exclusive and non-recurrent power and discretion to determine the right of the petitioner (and other railroads similarly situated) to reimbursement thereunder, which required on the part of the Commission an interpretation of the law and a determination of the facts. The exercise of this jurisdiction was not an exertion of the power delegated to the Interstate Commerce Commission as such.

3. That the determination of the Interstate Commerce Commission under Sections 204 and 212 in including petitioner within the terms thereof, assuming but not conceding the same to be erroneous and unwarranted, was and is final and conclusive, binding alike upon the United States, the petitioner, the Commission, and the courts, in the absence of provision by Act of Congress for appeal or review, so that the decision of the Commission cannot be re-opened, reviewed, reversed or set aside in this or any other proceeding.

4. The Interstate Commerce Commission had no power to rescind and set aside its award of reimbursement—*A fortiori*, it has no such power after its personnel had been changed.

5. That the reimbursement, paid to petitioner in accordance with Section 204, was not a payment for which the Government had received nothing in exchange. It was

a reimbursement for decrease in railway operating income sustained by it by reason of government operation of railroads during the war period, particularly in view of the fact that it has been held to be taxable income by this Court. The money *ex aequo et bono* belongs to petitioner.

6. That the payment of the money to petitioner under Section 204 was the result of a compromise and settlement, and cannot be recovered back by the Government.

VII.

ARGUMENT.

Since this case was decided on the pleadings, to wit, the demurrer to the complaint and the motion for judgment on the pleadings after amended answer filed, the specification of errors is necessarily general. However, the questions presented are raised by the rulings on demurrer and motion for judgment on the pleadings and entry of judgment. The correctness of the decision of the Circuit Court of Appeals for the Ninth Circuit is determinative of this case. It is respectfully submitted that the decision was and is incorrect, that error was committed, as hereinafter shown, and that the judgment should be reversed.

1. THE CIRCUIT COURT OF APPEALS ERRED IN HOLDNG THAT SECTION 204, SUBDIVISION (A), OF THE TRANSPORTATION ACT OF 1920, DOES NOT INCLUDE PETITIONER WITHIN ITS TERMS.

Petitioner was one of the railroads entitled to be reimbursed under Section 204.

In addition to the other requirements of subdivision (a) of Section 204 (Appendix 22), all of which are conceded, it "sustained a deficit in its railway operating in-

come for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation."

This phrase must be held to mean a decrease or falling off in railway operating income, and not a "red ink" figure because; (a) it is the correct definition of the word "deficit" itself; (b) it accords with the intent of the Congress as shown by the Congressional Record; (c) it remedies the known mischief, which was actual loss of income to petitioner and other railroads similarly situated on account of diversion of traffic and other disabilities under which they labored during the Federal control period; (d) it accords with the history of this and similar acts relating to railroads during the war period and subsequent thereto; and, (e) because any other construction would result in discrimination and injustice.

It is appropriate to detail briefly the causes and circumstances leading up to, and the reasons for, the adoption of Section 204, as well as the history surrounding its passage.

This Court has recognized the propriety thereof, in dealing with Sections 209 (Appendix 25) and 212 (a) (Appendix 32), found in that portion of the Transportation Act of 1920 (Appendix 21) in which Section 204 is found, in the following language:

> "Thus far we have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute. In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress. United States *v.* Missouri Pacific Railroad Co., 278 U. S. 269, 278, 49 S. Ct. 133, 73 L. Ed. 322."

United States *vs.* Great Northern Railway Company, 287 U. S. 144, 53 S. Ct. 28, 32.

We have, therefore, included in the Appendix, under separate cover, for convenient reference, the parts deemed material, of the legislation under which the President took possession of the railroads December 28, 1917; of his proclamation and statement in that regard; of the Federal Control Act adopted in 1918; of the Transportation Act adopted in 1920; and of the general facts and circumstances and the legislative history surrounding the adoption of the Transportation Act.

By joint resolutions of Congress in 1917, a state of war was declared to exist between the United States and other countries, and the President was empowered in time of war by an act of Congress, approved August 29, 1916, (Appendix 1) to take possession and assume control of the railroads. In pursuance thereof, the President, by proclamation bearing date December 26, 1917 (Appendix 2), did take possession and control on December 28, 1917, of *all* railroads within the continental United States, and an individual designated in said proclamation as Director General of Railroads was empowered and directed to enter upon negotiations with the owners thereof *"looking to agreements for just and reasonable compensation for the possession, use and control of their respective properties on the basis of an annual guaranteed compensation * * * equivalent as nearly as may be to the average of the net operating income thereof for the three-year period ending June 30, 1917."* (Italics ours.) (Appendix 3.)

Following this, possession was taken of all railroads, including petitioner's. On March 21, 1918, the "Federal Control Act" (Appendix 6) was passed, by which the President was *"authorized to agree with and to guarantee to any such carrier* (under Federal control) * * * *as*

just compensation an annual sum payable from time to time in reasonable installments for each year and pro rata for any fractional year of such Federal control not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.'' (Italics ours.) (Appendix 6.)

The Act further provided, for the three-year period ended June 30, 1917, that the *''average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.''* (Italics ours.) (Appendix 7.)

The Act also provided that, if during the three-year period ended June 30, 1917, because of non-operation or for some equally compelling reason "so exceptional as to make the basis of earnings hereinbefore provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just." (Appendix 9.)

Federal control of railroads continued uninterrupted from December 28, 1917, to February 29, 1920, on which latter date, by virtue of the Transportation Act, 1920 (Appendix 21), all railroads then remaining under Federal control were relinquished. Shortly after the passage of the Federal Control Act many railroads were relinquished by the Director General from Federal control, and left to shift for themselves. The petitioner was so relinquished September 27, 1918. *Had it remained under Federal control, it would have received the same amount as it subsequently received under Section 204.*

The President's proclamation and notice, the Federal Control Act, the Transportation Act, 1920, and the investigations had and the action taken by Congress in regard thereto and in the passage of such legislation disclose:

1. That there was a necessity for taking the railroads into Federal possession and control, and for the operation thereof as a federally unified system of transportation. (Appendix 2, 4, 39.)

2. That the owners of the railroads were entitled to just compensation for such Federal taking and use of their railway properties. (Appendix 4, 5.)

3. That the "test period", being the three years ended June 30, 1917, was considered as a fair and reasonable period of railroad operation to use as a basis for measuring the damages resulting to railroads during Federal control, except as to those railroads whose operations during said test period, as defined by the Act, were such that the test period could not fairly be used for such a basis. (Appendix, 9, 24.)

4. That the test period used was considered fair, because in one year thereof operations resulted in a poor year, and in two years operations resulted in good years, for the railroads, and the three years averaged together produced a fair basis and yielded an average annual return to the railroads on book value of 5.32 per cent. (Appendix 99, 100.)

5. That the standard of compensation paid the railroads retained under Federal control was measured by the railroads' respective test period operations. (Appendix 7, 33, 82.)

6. That many railroads (including petitioner's) which competed for traffic or connected with federally controlled

and operated railroads were relinquished from Federal control and operation in 1918. (Appendix 35, 63, 76.)

7. That the Director General of Railroads during the period of Federal control and operation fixed scales of wages, controlled, routed and diverted traffic, fixed divisions, and did other things, the effect of which was to seriously impair and damage the released railroads; the damage so sustained was a direct consequence of Federal control and operation. Such released railroads had to meet the wage scales fixed by the Director General or lose their employees. They suffered from the Federal control, diversion and routing of freight, and from other causes. (Appendix 35, 63-65, 76.)

8. That Congress realized the injustice being done and the damage inflicted upon such released railroads, and attempted to rectify the situation by placing such released railroads, so far as compensation was concerned, in the same position as federally controlled and operated railroads, but the President vetoed such Congressional action. (Appendix 63-65, 74, 89-93.)

9. That the railroads operated under Federal control, as a whole, had railway operating revenues in excess of railway operating expenses; they had railway operating incomes. These railway operating incomes in many months of Federal control were insufficient to meet the "test period" compensation required to be paid them; in some months there was a surplus. Whenever railway operating income was insufficient to meet "test period" obligations, such lack, insufficiency or deficiency in railway operating income was known and so regarded as a deficit in railway operating income in relation to "test period" requirements. (Appendix 36-39, 59, 67-68, 81-86.)

10. That the Transportation Act, 1920, including Sections 204 and 209, was passed after Congress had given many months' consideration thereto and to all the questions involved therein. (Appendix 89.)

11. That in the adoption of Section 204, Congress again recognized injustice had been done, injury had resulted, and damage had been sustained to previously released railroads by reason of Federal control. Congress considered that railroads which had railway operating incomes during private operation in the Federal control period, *less* than their railway operating incomes in the test period, were in the same category as released railroads that operated in the test period, which had railway operating revenues in the Federal control period insufficient to meet railway operating expenses. (Appendix 49-53, 73, 74.)

12. In the passage of the "guaranty section" (209), Congress recognized that all railroads, those released by the Transportation Act, as well as those previously released, would be affected, impaired and damaged as a result of the ending of Federal control, so Congress fixed the same basis of compensation for six months from March 1, 1920, as to railroads then and previously released, as the compensation based on "test period" operations, when the Federal Control Act was adopted. (Appendix 35, 38, 53, 93.)

13. That Congress applied to the latter portion of subdivision (f), section 204 (Appendix 24), substantially the same principle of classification it had applied to railroads in the adoption of the Federal Control Act (Appendix 9), the reason being, in each instance, that lack of operation in the "test period" would afford no *criteria* for ascertaining the damage sustained by railroads so situated.

14. *That Congress adopted and adhered to a general policy and purpose of uniformity and equality with respect*

to all railroads with sufficient test period operations, which operated under or competed for traffic or connected with a railroad operated under Federal control when it passed the various statutes in question. It fixed a uniform basis for payment to such railroads in the nature of compensation as measured by test period operations; this uniform basis was carried through the Federal Control Act; through the Act of Congress of June 29, 1918, vetoed by the President; through Section 204 and Section 209 of the Transportation Act, 1920.

a. In construing Section 204, the Circuit Court of Appeals erred in not giving to the word "deficit" its accepted use and meaning.

In adopting Section 204, subdivision (a), Congress defined carrier to mean, among other things, "one which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad." (Appendix 22.)

The natural import of the phrase "deficit in its railway operating income" as used in subdivision (a), Section 204, which subdivision (a) defines the term "test period", clearly indicates a decrease in railway operating income during the Federal control period as compared with the test period.

The word "deficit", as it has been variously defined by lexicographers, ordinarily means "deficiency, or something wanting, as a failure or falling off in amount, specifically a financial deficiency, as a deficit in taxes or revenue."

"DEFICIT. A deficiency or falling short in amount (Latin: it is wanting). *Deficiency* is the state of being deficient. Lack, insufficiency, incompleteness, e. g., a deficiency in blood. *Deficient*, lacking, insufficient; not hav-

ing an adequate or proper supply or amount, e. g., the regiment was deficient in arms."

Funk & Wagnalls' New Standard Dictionary.

"DEFICIT. (Latin: it is wanting). The deficiency which is discovered in the accounts of an accountant, or in the money which he has received."

Bouvier's Law Dictionary.

"DEFICIT. Something wanting, generally in the accounts of one intrusted with money, or in the money received by him."

Black's Law Dictionary.

"DEFICIT. (Latin: *deficit*, it is wanting, 3rd per. sing. pres. ind. of *deficere*, be wanting; see deficient.) A failure or falling off in amount; specifically, a financial deficiency; as a deficit in taxes or revenue.

"DEFICIENCY. (Latin: *deficen* (t)—a deficient; see deficient.) The state of being deficient; a lack or failing; a falling short, incompleteness, as of intelligence, attainments or performance.

"DEFICIENT. (Latin: *deficien* (t—)s ppr. of deficere, lack, fail, be wanting.)

(1) Lacking, wanting, incomplete.

(2) Defective, imperfect, inadequate.

(3) Not having a full or adequate supply; as the country is deficient in the means of carrying on wars."

The Century Dictionary.

"DEFICIT. Want, deficiency in an account or number as a deficit in the taxes or revenues."

18 Corpus Juris, 465.

"DEFICIENCY. The lack of a part; shortage or insufficiency."

18 Corpus Juris, 465.

In *Early Foster Co.* v. *Gottlieb*, 214 S. W. (Tex.) 520, the Court construed a rule of a grain dealers' association, incorporated by reference in a contract, and said (522):

> "In its plain and ordinary meaning, the word 'deficit' implies a deficiency, and as here used clearly means a deficiency in the quantity or a failure of the seller to ship a portion of the products contracted to be delivered."

In *Mutual Loan & Bldg. Assn.* v. *Price*, 19 Fla. 127, 137, the Court defines "deficit" by stating:

> "Worcester gives its meaning as 'want, deficiency in an account or a number', Johnson gives its meaning as 'want, deficiency'. And Webster defines it as 'want, deficiency, as a deficit in the taxes or revenue'."

In the case of *In Re Village of Plattsburg*, 50 N. Y. Supp. 356, 361; 27 N. Y. App. Div. 353, 360, a "deficiency" is defined to be *"the lack of a part"*.

Hence the clause in Sec. 204, subdivision (a) "and which sustained a deficit in its railway operating income", giving the words their natural and ordinary meaning, necessarily implies a railroad "which sustained a deficit (or deficiency or the lack of a part) in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad * * *." And this natural and ordinary meaning is consistent with the legislative intent, as will be shown.

The term "railway operating income" has been judicially defined; its meaning is well known.

"It embraces the results of railway operation, as distinguished from income from other sources, and is not gross 'operating revenue', but such revenue decreased by 'operating expenses'."

Westbrook *v.* Director General, 263 Fed. 211.

Since the primary meaning is "decrease" or "falling off," we have a phrase when "deficit" is coupled with "railway operating income," whose natural and primary import is a decrease or falling off in amount of railway operating income. This presupposes a standard of comparison showing that a falling off in railway operating income means a decrease as compared with some other yardstick of measurement, and when used here in respect of the portion of Federal control during which petitioner operated its own railroad, that standard must be some other period by which the decrease or falling off in railway operating income is to be measured.

There is but one comparative period, and that is the test period referred to in the same subdivision (a), which is defined: "The term 'test period' means the three years ending June 30, 1917." (Appendix 23.)

It follows that the natural meaning of the phrase "deficit in its railway operating income," as used in subdivision (a) of Section 204, means a *decrease* in railway operating income in the Federal control period as compared with the railway operating income in the test period.

There is nothing in the words themselves which justifies, much less compels, the construction last adopted by the Interstate Commerce Commission, since the words themselves negative such a construction. This construction is to the effect that "deficit" means the amount by which railway operating expenses exceed railway operating revenues.

To justify the decisions of the lower courts herein, the clause in question must be construed as an absence of railway operating income.

Throughout the Section, notably in subdivisions (b), (c), (d) and (e), is a recurrence of the word "deficit". In these instances the word "deficit" is used in a *restricted accounting sense,* defining railway operating revenues as being something less than railway operating expenses. The difficulty confronting the Interstate Commerce Commission when it last dealt with the meaning of the word deficit lies in the fact, that because "deficit" is used in the parts of Section 204 with a restricted accounting meaning, therefore that restricted accounting meaning must of necessity extend to and be applied to the word "deficit" as used in the definitive subdivision (a), when it is manifest from the text of the definitive subdivision (a) and the obvious purpose and meaning of the subsequent granting subdivisions of Section 204 that any railroad whose private operations in the Federal control period were less than its operations in the corresponding test period was to receive the benefits of the Act and be compensated in damages to the extent of such difference.

In subdivision (d) it is said "For every month of the period of Federal control during which the railroad * * * was not under Federal operation the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, * * * (3) the sum of its Federal control return if a deficit, plus its test period return, if an income." (Appendix 24.)

By subdivision (e) it is further provided "For every such month the Commission shall then ascertain * * * (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit,

or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit." (Appendix 24.)

By subdivision (f) it is then further provided that if the sum of the amounts so credited to the carrier under subdivision (d) exceeds the amounts credited to the United States under subdivision (e), the difference shall be payable to the carrier. (Appendix 24.)

Manifestly, "deficit" as thus used in subdivisions (d) and (e) is used antithetically, in a restricted and technical accounting sense, and means that the carrier either in months in the test period or in the Federal control period had railway operating expenses in excess of railway operating revenues.

Subdivisions (d) and (e) contain other provisions. Subdivision (d) provides that "For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the Commission shall then ascertain * * * (2) the difference between its test period return, *if an income,* and its Federal control return, *if a smaller income* * * *. The sum of such amounts shall be credited to the carrier." (Appendix 24.) Similarly subdivision (e) provides that "For every month the Commission shall then ascertain (1) the difference between the carrier's Federal control return, *if an income,* and its test period return, *if a smaller income,* * * *. The sum of such amounts shall be credited to the United States." (Appendix 24.)

Subdivision (f) applies to the situation contemplated by subdivision (d), clause (2), and by subdivision (e), clause (1), with the same force that it applies to the other clauses therein, and as already indicated, subdivision (f) affirmatively directs that "if the sum of the amounts so credited to the carrier under subdivision (d) exceeds the

sum of the amounts so credited to the United States under subdivision (e), the difference shall be payable to the carrier." (Appendix 24.)

These provisions of subdivisions (d) and (e), however, only apply where the railroad in question has been operated for a year or longer in the test period. Where a railroad was operated for less than a year, or not at all, in the test period, a different rule is prescribed, for the apparent and obvious reason that, since there was so short an operation in the test period or none at all, there would be no reasonable yardstick with which to compare operations. In the absence of such a yardstick, a reasonable classification is prescribed by subdivision (f) which in effect provides that where railway operating revenues are exceeded by railway operating expenses, the difference shall be payable to such a carrier. (Appendix 24.)

Section 204 should be construed so as to bring within its remedial provisions, all railroads released from Federal control and operated privately during a portion thereof, which competed for traffic, or connected with a railroad under Federal control, and operated for more than a year in the test period, and which, under private operation during Federal control (as a whole) sustained *a loss,* by comparison with their operations in the corresponding portion of the test period.

That this construction is correct is borne out from the fact that Section 204 (f) provides that if the amounts credited to the carrier under Section 204 (d) exceed the amounts credited to the United States under Section 204 (e) the difference shall be payable to the carrier.

The provisions of Section 204 (c), (d), (e), (f) and (g) are mandatory; they require and compel the action there contemplated; and if there is a loss to the carrier in the control period by comparison with the test period, that loss

"shall be payable to the carrier". Congress, when it adopted these provisions, followed the same policy for reimbursement inaugurated by the Federal Control Act.

Moreover, Section 204 bears the official title "Reimbursement of Deficits During Federal Control". (Appendix 22.) If the word "deficits" in this title is construed in its technical accounting sense, the title would not be descriptive of the subject matter. The Section makes provision for reimbursement, not of the short line carrier's deficit sustained under private operation in the Federal control period, but of the decrease or loss in railway operating income during the period of private operation as compared with the corresponding test period railway operating income.

Clearly the word "deficits" as used in the title means the difference between the railway operating income in the test period and the railway operating income in the control period. If the word "deficit" as used in Section 204 (a) means a "red ink" figure, it has a different meaning than the word "deficits" as used by the Congress in the title.

In *United States* v. *Katz*, 271 U. S. 354, 357, this Court, with respect to the legislative purpose, said:

> "In ascertaining that purpose we may examine the title, * * *."

To the same effect:

> Knowlton *v.* Moore, 178 U. S. 41, 65.

Such a construction makes the title descriptive of the subject matter and gives meaning to every word, clause, phrase and subdivision of Section 204.

As was said by this Court in *Costanzo* v. *Tillinghast*, 287 U. S. 329, 53 Sup. Ct. 152, 153: "We must look to the

whole of the section, in order not to give undue effect to particular words or clauses, * * *."

In this connection the District Court held (R. 14):

> "It may be that the term in Par. a, 'deficit in its railway operating income,' *is inaccurate to express the idea of outlay exceeding income or a red balance;* but Congress having so used it some half score other places in the Act must be taken to have likewise used it in Par. a; no different intent clearly appearing." (Italics ours.)

It was apparent the District Court regarded that "deficit in its railway operating income" as used in subdivision (a), without regard to the other parts of the Section and applying to the word "deficit" its general meaning, meant precisely what we have above urged, *viz.*, a decrease or falling off in its railway operating income as compared with the test period. If this were not so, the District Court would not have used the expression *"inaccurate to express the idea of outlay exceeding income."* (R. 14.) The District Court, however, although subdivision (a) is one of definition, restricted the meaning of the word "deficit" as there used, to its technical accounting sense, simply for the reason that the word as elsewhere used was used in a strictly accounting sense.

The Circuit Court of Appeals, sustaining the District Court, narrowed the construction of subdivision (a) of Section 204 to exclude petitioner, intimating that such narrowed construction was admitted (whereas petitioner had strenuously argued otherwise), in the following language:

> "It seems to be admitted that the terms of subdivision (a) of Section 204, taken alone, entitles a carrier to compensation only when it operated at a loss during the control period." (R. 89.)

Whereas, this Court, in the case of *Continental Tie and Lumber Co.* vs. *United States,* 286 U. S. 290, 293, decided May 16th, 1932, had before it the question whether payments made under Section 204 were income, and held that:

> "* * * This section provided for such an award and payment to a railroad which during any part of the period of Federal control competed for traffic, or connected, with one under Federal control, and sustained a deficit in operating income for that portion of the period during which it operated its own railroad. *The act directed the Commission to compare the results of such operation with those of the test period, defined as the three years ending June 30, 1917; and, if less favorable during the period of Federal control than during the test period, to award an amount calculated as prescribed by the section.* The Commission made an award and the Secretary of the Treasury paid the Railway." (Italics ours.)

This statement of the Supreme Court clearly shows that if the operation was less favorable during the period of Federal control than during the test period, the railroad should be awarded the difference. The words "less favorable" do not import a loss but merely a decrease.

It is true that in the *Continental Tie case* (286 U. S. 290), the railroad involved was a "red ink" railroad, as hereinabove denominated. Nevertheless the scope of the opinion of the Supreme Court is broad enough to include the petitioner within the terms of subdivision (a) of Section 204.

The same construction was placed on the words "deficit in railway operating income" in the case of *United States ex rel. Cripple Creek & Colorado Springs Railroad* v. *Interstate Commerce Commission,* 11 Fed. (2d) 554, 555. (Certiorari denied, 273 U. S. 706.)

The Circuit Court of Appeals seems to have assumed that the narrower definition of "deficit" and "deficit in railway operating income" should be applied because the same word and the same phrase were used in a restricted sense elsewhere.

The fact that Congress used the same word, or the same phrase, in two different sections or subdivisions of the same act is not at all conclusive that such word or phrase meant the same in each. This Court dealt with this question in its opinion in the case of *Atlantic Cleaners & Dyers* v. *United States*, decided May 23, 1932, 286 U. S. 427, 432, 433, wherein the Sherman Anti-Trust Act was under consideration. This Court said:

> "The words describing the activity declared to be illegal are the same in both sections, namely, 'restraint of trade or commerce.' The contention on behalf of appellants is that the words, being identical, should receive the same construction in section 3 as in the preceding section 1; * * * It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance."

To the same effect:

> Interstate Commerce Commission *vs.* Alabama Midland Ry. Co., 168 U. S. 144, 166.

The correctness of petitioner's position in connection with the construction of Section 204 was denied, as indicated above, by the District Court and the Circuit Court of Appeals, on what we consider inconsistent grounds.

When petitioner contended that Section 204 (a) includes

petitioner within its terms, it was held that this subdivision cannot be construed without reference to the use of the phrase "deficit in its railway operating income" in other subdivisions of Section 204, and elsewhere in the Act.

When petitioner contended that, when Section 204 (a) is read in connection with the other mandatory subdivisions of the same Section, and the title, the Section becomes harmonious and each word, phrase and clause is given effect, it was held that Section 204 (a) defines the carrier entitled to the reimbursement under the Act and that its scope cannot be enlarged by anything found elsewhere in Section 204.

We believe that failure to realize this inconsistency resulted in the adoption of the incorrect construction of Section 204 by both the District Court and the Circuit Court of Appeals.

b. In construing Section 204, effect should have been given to the intent of Congress as shown by the Congressional Record.

In the consideration of these matters by the Congress the word "deficit" was constantly used as the difference between the test period income and the Federal control period income, without any relation as to whether or not the Federal control period income showed a "red ink" figure or otherwise.

We quote briefly from the Congressional Record, Volume 59, Part 1, page 727, December 17, 1919, which quotation appears in the appendix hereto at pages 82 to 84, as follows:

> "Mr. Pomerene. The Senator, I think, was not in the Chamber when I began my discussion of the matter. These are figures furnished to me by the Inter-

state Commerce Commission. They get monthly reports. The test period was for 1915, 1916, and 1917. As they take the reports for January, let us say, for each of those years they average them and this average makes up the compensation which the Government is to pay the railroads for the month of January during the period of Government control.

Let me take the month of June. The net railway operating income for the month of June was $52,200,000, the standard return guaranteed $83,400,000, the deficit $31,200,000.

In July the net railway operating income was $77,100,000, the standard return guaranteed $75,600,000, so that for the first time in any month of the year we have a surplus of $1,500,000.

In August the net operating income was $92,000,000, the standard return guaranteed $87,600,000, and again there is a surplus of $4,700,000.

In September the net railway operating income was $77,700,000, the standard return guaranteed $92,100,000, and again there is a deficit of $14,300,000.

In October the net railway operating income was $76,300,000, the standard return guaranteed $95,100,000, and again there is a deficit of $18,800,000.

So that during the ten months the total net railway operating income was, in round numbers, $481,000,000, and the standard return guaranteed for those months $748,000,000, and the deficit for the ten months is $267,000,000.

The tabulated statement referred to and which was furnished by Hon. George B. McGinty, secretary of the Interstate Commerce Commission, is as follows:

Net railway operating income of large roads in the United States by months in calendar year 1919, in

comparison with the standard return under the Federal Control Act.

Month	Net Railway operating Income 1919	Standard Return Guaranteed	Surplus or Deficit
January	$18,783,702	$55,442,674	**$36,658,972
February	10,106,268	46,493,912	** 36,387,644
March	10,842,608	67,738,212	** 56,895,604
April	26,115,214	67,102,681	** 40,987,467
May	39,462,367	77,729,962	** 38,267,595
June	52,270,702	83,444,790	** 31,174,088
July	77,176,933	75,650,613	*** 1,526,320
August	92,396,635	87,681,468	*** 4,715,168
September	77,763,023	92,122,874	** 14,359,851
October	76,397,213	95,123,649	** 18,726,436
Ten months ending with October	*481,082,531	748,530,835	*267,448,304

*Includes some corrections made in monthly returns as published.
**Deficit.
***Surplus.

Now, let us analyze these figures a little further. The computations which I now give were made by the clerks in my office. They are simple and correct.

Senators will remember from the figures I have given that in 8 of the 10 months there was a deficit. The total deficit for the 8 months was $273,457,657. There were two months in which there was a surplus, July and August, amounting for the two months to $6,241,488. The average deficit for the eight months was $34,182,207.12, and the average surplus for the two months was $3,120,744. The net deficit for the

10 months was $267,216,169. The net deficit for each of the ten months was $26,721,616.90. The total standard return guaranteed for the ten months was $748,530,835, and the total standard return for 1 month on the average is $74,853,083.50."

Again, in the House Record, November 12, 1919, Volume 58, Part 8, page 8395 (Appendix 38, 39), we find Mr. Sims, a member of the Committee reporting the bill, using the following language with reference to the use of the word "deficit" as understood by the Congress and in connection specifically with Mr. Madden's proposed amendment to repeal the Act authorizing the President in time of war to take possession and assume control of any system of transportation, or part thereof, and utilize the same:

"Mr. Chairman, I rise in opposition to the amendment. Gentlemen, there is no use now in using language that misleads or deceives anybody or is likely to do it. Now, let us look the question fairly and squarely in the face. When we use the word 'deficits' in ordinary use, it means a deficit in expenses of operation; that is, that the railroad has not paid its way. Now, the meaning of deficit referred to here is that the Government lacked that much of having made operating expenses and the rental due the roads. * * * And the deficit was not a deficit at all in the ordinary sense. We lost on our rental contracts. That is all there is of it. Talking about the deficit in the first year means that we did not make the rent contract in addition to expenses of operation."

Again, in the House, Mr. Esch, *one of the managers in charge, in introducing the conference bill*, said:

"We take care of them in the matter of consolidations, and also allow them 100 per cent. compensa-

tion under the Federal Control Act. We also take care of them in the matter of loans to carriers. I think on the whole the short line roads have been treated fairly and possibly generously treated, but unless they are fairly and generously treated, the trunk line itself may suffer, because the short line is the feeder for the trunk line, and it is as necessary to the people living thereon as is the trunk line to the people it serves." (Appendix 55.)

Additional matters showing the intent and purpose of the Congress are set out in the appendix beginning on page 33.

c. By reason of the known mischief to be remedied, which was actual decrease of income to petitioner and other railroads similarly situated on account of diversion of traffic and other disabilities under which they labored during the Federal control period, Section 204 should have received in any event a liberal construction.

The known mischief to be remedied was clearly recognized and determined by this Court in the following language in declaring the purpose of Congress in the enactment of Section 204:

"* * * By the terms of section 204 payment was to be made to railroads not under federal control of a proportion of any operating deficit suffered in the period of such control. The underlying purpose of Congress was the same in both cases. Railroads falling within section 204 were principally short lines. They were known to have suffered serious losses in income due to routing arrangements and other administrative measures made necessary by government

operation of the larger railroad systems. The Transportation Act did not contemplate that the payments to be made pursuant to section 204 were in any sense just compensation for the taking of property. There was no room for such reimbursement, as the short lines were during the time to which the section applied in the possession and management of their owners. Congress, nevertheless, realized that federal operation had caused them consequential losses, at least partial redress for which was the purpose of the section where actual deficits in income had resulted. * * *"

Continental Tie & Lumber Co. *v.* United States, 286 U. S. 290, 294.

In the same case this Court determined Section 204 to mean:

"* * * The act directed the Commission to compare the results of such operation with those of the test period, defined as the three years ending June 30, 1917; and, if less favorable during the period of federal control than during the test period, to award an amount calculated as prescribed by the section. * * *"

Continental Tie & Lumber Co. *v.* United States, 286 U. S. 290, 293.

When the Federal Control Act was adopted, Senator Cummins offered an amendment thereto, which was incorporated as a part of Section 1 of the Act as follows:

"That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use and control, or which connects with such rail-

roads and is engaged as a common carrier in general transportation, shall be held and considered as within 'Federal control', as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: * * *." (Appendix 9.)

Section 14 of the Act provides that "The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable. No right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished." (Appendix 19.)

Notwithstanding this latter provision, it is apparent from the former, that released railroads like petitioner were still to be regarded as "necessary for the prosecution of the war * * * and entitled to the benefits of all the provisions of the Act."

Obviously, the provisions of Section 14 were not intended to apply to petitioner, although released and privately operated, since by virtue of the mandatory provisions of Section 1, petitioner was to *"be held and considered as within 'Federal control'."*

Congress must have used the word *"as"* advisedly; used it as an adverb, denoting, as the word is defined, equality or likeness in kind, quality, degree or manner.

Included with released railroads were certain ones engaged as common carriers in general transportation, such as petitioner, "not owned, controlled or operated by another carrier company * * * which * * * theretofore competed for traffic or which connected with" (Appendix 9) a railroad, the possession, use and control of which had been taken by the President.

Although railroads so described might, as many were, including petitioner, be relinquished and privately oper-

ated, they were still under the provisions of and protected by the Federal Control Act, since in terms the Act declared that such railroads "shall be held and considered *as* within Federal control" and "necessary for the prosecution of the war." (Appendix 9.)

The effect of this paragraph in Section 1 was to separate such railroads from the class of those released and denied compensation under Section 14, and as to them make a class, although relinquished, still by right entitled to compensation. They were not within the last sentence of Section 14.

Congress thus intended that but one class of railroads should not receive compensation, being those released railroads which were not owned, controlled or operated by another railroad under Federal control and which had not competed for traffic or had not connected with a railroad under Federal control, or were not engaged as common carriers in general transportation.

Here again is made manifest the policy and purpose of Congress to reimburse railroads such as petitioner.

The petitioner and railroads similarly situated, although the law required that they "shall be held and considered as within 'Federal control' * * * and entitled to the benefits of all provisions of this Act", did not receive the benefits thereof, so Congress, still following the same policy and purpose, when adopting the Transportation Act, 1920, gave the same relief to petitioner and other railroads in like situation by enacting Section 204, as it sought previously on two occasions to give; by adopting the Cummins amendment above quoted and by passing the bill vetoed by the President July 11, 1918. (Appendix 89-93.)

This Court should not adopt a construction, as did the lower courts, contrary to the obvious purpose and policy of Congress. It should adopt a construction consistent with that policy and purpose, in accordance with the rule in

Johnson v. *Southern Pacific,* 196 U. S. 1, which was based upon the Safety Appliance Act, wherein it was argued *inter alia,* that the law must be strictly construed, because the Act was penal and changed the common law as to assumption of risk.

The rule as announced in that case was (page 18):

> "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature."

If the interpretation placed upon the purpose of the Congress in enacting Section 204 is restricted so as to cover only "red ink" carriers, it would be obviously unjust and discriminatory as to those carriers, such as petitioner, which suffered a decrease and falling off in railway operating income during the Federal control period as compared with the test period. The general rules of construc-

tion of remedial statutes and their interpretation are exemplified by this Court in a decision construing an act to quiet land titles in California, wherein this Court said that:

> "* * * Those who could not show actual grants from the Mexican Government might nevertheless have equities quite as strong in their favor as those who could show an actual grant which was defective. The act of Congress should not be so construed as to except from its remedial provisions those who were without an actual grant while at the same time filling every other requirement of the act, unless the language used therein is open to no other interpretation. * * * The purpose of the act is to quiet titles in California, and, as stated by the court below, it is a remedial statute and one entitled to a liberal construction in order to effect the purpose and object of its enactment. * * * Otherwise, it seems to us clear that the purpose for which this seventh section was passed *would be so circumscribed as to reduce it to much narrower limits than the known mischief to be remedied called for.*" (Italics ours.)

Beley *v.* Naphtaly, 169 U. S. 353, 359-361.

d. The history of this and similar acts relating to railroads during the war period and subsequent thereto is a proper aid to the correct construction of Section 204.

In *Northern Pacific Ry. Co.* v. *Interstate Commerce Commission,* 23 Fed. (2d) 221, 224 (*Certiorari* denied, 275 U. S. 572), the Court of Appeals of the District of Columbia dealt with Sections 209 and 212, Transportation Act, 1920, and in applying rules of construction, said:

> "* * * As observed in Ozawa *v.* United States, 260 U. S. 178, 194, 43 S. Ct. 65, 67 (67 L. Ed. 199): 'It

is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance; but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning, in order that the purpose may not fail.' See, also, Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 390, 391, 44 S. Ct. 391, 68 L. Ed. 748."

To the same effect:

United States *v.* Great Northern Railway Company, 287 U. S. 144, 53 Sup. Ct. 28, 32.

Before considering statutes strictly in *pari materia,* attention is directed to subdivision (b), Section 204 (Appendix 23), wherein reference is made as to how railway operating income or any deficit therein shall be computed, both for the period of Federal control and for the test period. In the first situation the computation is to be made in the manner similarly provided in Section 209, Transportation Act, 1920; and in the second situation the computation is to be made as provided by Section 1 of the Federal Control Act. These two sections, therefore, are made a part of Section 204; they disclose the manifest purpose and policy of Congress to afford released railroads the same basis of compensation measured by the test period as afforded to railroads operated under Federal control by Section 1 of the Federal Control Act and afforded to *all* railroads by Section 209, Transportation Act, 1920. This rather strikingly emphasizes the purpose and intent of Congress to treat

released railroads under Section 204 precisely as railroads were treated under the Federal Control Act and Section 209, Transportation Act, 1920.

Not only are parts of Section 1 of the Federal Control Act and Section 209, Transportation Act, 1920, by reference made a part of Section 204, but such reference necessarily makes them in their entirety in *pari materia* with Section 204.

Other statutes in *pari materia* to Section 204 are the other sections of the Transportation Act, 1920, and the Federal Control Act.

Aside from reimbursements provided for by Section 204, provision was made for termination and relinquishment of Federal control (Section 200) (Appendix 22); "for adjustment and liquidation of all matters, including compensation * * * arising out of or incident to Federal Control" (Section 202); for compensation of carriers with which no control contract was made (Section 204); for guaranty in payment to all carriers for six months after March 1, 1920, of an amount equivalent to "just compensation" (Section 209); for partial and final payment certificates (Section 212).

This legislation discloses the manifest policy and purpose of Congress to deal with all carriers on or as near a basis of equality as their situations would permit, particularly as to compensation "arising out of or incident to Federal control." It discloses the same policy to carriers not under Federal control, as to those under Federal control, which during the test period had a railway operating income, in providing that all such railroads should be guaranteed for the six months' guaranty period not "less than one-half of the average annual railway operating income of such carrier during the test period"; the same policy in providing that any railway operating deficit

in the six months' guaranty period should not be greater than one-half of the average annual railway operating deficit for the test period.

Since the manifest policy and purpose of Congress was to put *all* railroads, with test period operations on the same basis of compensation for the six months' guaranty period, as railroads received during Federal control, Congress invested with the Interstate Commerce Commission the duty of ascertaining and certifying to the Treasurer of the United States the amounts payable to carriers under the six months' guaranty period.

The method of determining the guaranty in Section 209 for the guaranty period is substantially the same as the method of determining the amount due carriers under Section 204. These sections provide for remuneration on the theory of consequential losses. A carrier did not have to sustain a "red ink" deficit in the Federal control period to receive reimbursement under Section 209, and it is impossible to conceive that Congress intended under Section 204 to compensate only those short line railroads having consequential losses provided they sustained a "red ink" deficit, and intended not to compensate under Section 204 those short line railroads whose consequential losses were as great or greater, by reason of a depleted operating revenue consequent upon the same Federal activity, if they did not sustain a "red ink" deficit.

In this connection attention is directed to the dissenting report of Commissioner Esch in *Deficit Status of Bingham & Garfield Ry. Co.*, 99 I. C. C. 724. *Judicial notice will be taken of the fact that Commissioner Esch was in Congress as a member of the House of Representatives when the Transportation Act, 1920, was under preparation, consideration, debate and passage, and was one of the managers in charge of, and who introduced, the*

conference bill, and while not binding, the statement of Commissioner Esch, in his dissenting report, page 730, predicated upon his first hand knowledge as a participant in the enactment of Section 204, is persuasive:

> "From my study of Section 204 and the facts and considerations connected with its enactment, it seems clear that the purpose and intent of Congress were to reimburse carriers for losses sustained because of Federal control."

And this Court itself has held that the underlying purpose of Congress was the same in the enactment of Sections 204 and 209.

> "What we have said in Texas & Pacific Ry. Co. *v.* United States, decided this day, *ante,* p. 285, is determinative of the first contention. Section 209 of the Transportation Act guaranteed the payment of any deficiency below a fixed minimum of operating income for the six months ensuing the termination of federal control to railroads which had been taken over by the United States. By the terms of Sec. 204 payment was to be made to railroads not under federal control of a proportion of any operating deficit suffered in the period of such control. The underlying purpose of Congress was the same in both cases. * * *"
>
> Continental Tie & Lumber Co. *v.* United States, 286 U. S. 290, 293, 294.

e. Any other construction of Section 204 than that of the Interstate Commerce Commission in "Construction of the Word 'Deficit'," 66 I. C. C. 725, in accordance with which petitioner was reimbursed, results in discrimination and injustice.

The Circuit Court of Appeals herein construed the provisions of subdivision (a) of Section 204 in a narrow and restricted sense and so as to exclude therefrom and discriminate against those carriers which filled every other requirement thereof, stating that:

> "The argument that a short line having a deficit in operating income under its own operation during Federal control is given unfair advantage over roads not suffering such deficit but producing but a small income, is beside the question, for the right of Congress to define the class of carrier entitled to benefits cannot be disputed." (R. 91.)

It is not disputed that the Congress has the right to define the class of carrier entitled to the benefits of the Act, but it is the duty of a court, in construing an act of Congress, to carry out the intent of Congress, taking into consideration the circumstances under which the act was passed and the known mischief to be remedied. Aside from the obvious purpose of subdivision (f) of Section 204 solely to take care of carriers which had no test period operation and to which the previous provisions of the Section could not apply, which is a common legislative provision, the Circuit Court of Appeals did not, by its decision, above quoted, give a liberal interpretation to Section 204, as required by the decision of this Court in the case of *Piedmont & N. R. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, 311, decided May 16, 1932, wherein this Court said:

> *"The Transportation Act was remedial legislation and should therefore be given a liberal interpretation."* (Italics ours.)

As was said in *United States* v. *Fisher,* 2 Cranch 358, 400:

"So, if the literal expressions of the law would lead to absurd, unjust or inconvenient consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done."

And again in *United States* v. *Kirby*, 7 Wall. 482, 486:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence."

In considering the Commission's construction, it is not inappropriate here to quote from *Hawaii* v. *Mankichi*, 190 U. S. 197, 214, where this Court has given approval to what Lord ESHER said in *Plumstead Board of Works* v. *Spackman*, L. R., 13 Q. B. D., 878, 887, as to a literal construction of a statute which would work hardship:

" 'If there are no means of avoiding such an interpretation of the statute' (as will amount to a great hardship) a judge must come to the conclusion that the legislature, by inadvertence, has committed an act of legislative injustice, but to my mind a judge ought to struggle with all the intellect that he has and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended."

The Congress in the enactment of Section 204 treated the word "deficit" and the phrase "deficit in its railway operating income" as used in subdivision (a) thereof as meaning, and intended that they should mean, the differ-

ence between the test period income and the income during the period of Federal control. To place a construction on this language which would restrict the application of the Section to railroads which suffered a loss during the period of Federal control would lead to an unreasonable and absurd result. A released railroad that sustained a loss of $1 in private operation during Federal control but which had an income of $100,000 in the corresponding test period, would be awarded $100,001 while another released road that had an income of $1 in private operation during Federal control and which had an income of $100,000 in the corresponding test period, though short $99,999 under the same circumstances, would receive nothing. Such restricted construction, leading to such unreasonable and absurd results, is contrary to the fundamentals of construction, and not in accord with the decision of this Court in the case of *Piedmont & N. R. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, wherein this Court held that the Transportation Act was remedial legislation and should therefore receive a liberal interpretation.

The rule of statutory construction above stated and applied is that a law will be so construed as to avoid injustice or discrimination.

The Circuit Court of Appeals recognized this rule in its decision, but, in the application of the rule, it arrived at an inconsistent and erroneous result. That Court first stated that (R. 90):

> "If it has not suffered a loss, it has no right to reimbursement. This construction appears to be in harmony with the purpose of Congress. If the construction that a diminution of income compared with the test period is the criterion then a discrimination would be worked against carriers of the same class

which operated for less than a year during the test period; * * *."

That Court almost immediately thereafter stated (R. 91):

> "The argument that a short line having a deficit in operating income under its own operation during Federal control is given unfair advantage over roads not suffering such deficit but producing but a small income, is beside the question, for the right of Congress to define the class of carrier entitled to benefits cannot be disputed."

It is evident from the language used by the Circuit Court of Appeals in these two quotations that in the former the Circuit Court permitted the discrimination mentioned therein to weigh in its mind in determining the intention of Congress, but, in the latter, the Circuit Court refused to give the discrimination mentioned therein any consideration at all, saying that such discrimination was beside the question, for the right of Congress to define the class of carrier entitled to benefits cannot be disputed.

The element of discrimination goes to the determination of the intent of Congress, and both of the discriminations indicated in the above quotations should at least have been taken into consideration by the Court. But the decision of the Circuit Court of Appeals is inconsistent as to the emphasis laid on the discriminations involved, and is erroneous in deciding the case without taking into consideration the discrimination against petitioner by stating that such discrimination was beside the question.

It is respectfully submitted that no better analysis of the meaning of the word "deficit" and the construction of Section 204 and the intention of Congress in enacting the same, has been made than is found in the decision of the

Interstate Commerce Commission in *Construction of the Word "Deficit"*, 66 I. C. C. 765. This decision determined the question of reimbursement to petitioner and other railroads similarly situated. It is material here, but we have refrained from quoting at length therefrom for the sake of brevity herein.

2. THE INTERSTATE COMMERCE COMMISSION WAS VESTED BY SECTIONS 204 AND 212 WITH POWER AND JURISDICTION TO INTERPRET THE LAW AND DETERMINE THE FACTS.

THE EXERCISE OF THIS JURISDICTION WAS NOT AN EXERTION OF A POWER DELEGATED TO THE INTERSTATE COMMERCE COMMISSION AS SUCH.

THE RULE IN WORK *v.* RIVES, 267 U. S. 175, SHOULD BE APPLIED HEREIN.

The Circuit Court of Appeals herein stated (R. 91) that:

> "The appellant contends that even though the Commission misconstrued the Act in allowing to the railroad the sum of money which the Government seeks to recover, that its act is not subject to review by the courts as the Commission had jurisdiction to determine the matter finally; that it acted judicially and that its first order must stand. This argument would be difficult to answer were the case one where the railroad had presented itself showing a deficit in its operating returns as compared with the test period and the dispute was as to the particular sum due to it. But, under the admitted facts, its case was not one which the Commission was authorized to consider at all."

After the conclusion of the war, the Congress, recognizing the losses suffered by and the damages done to the railroads, provided a method whereby the Government might pay its just obligations. The Congress committed the task of determining its obligations to the Interstate Commerce Commission, not as such, but as a special tribunal to hear and determine and decide all cases coming within Section 204 as well as Section 209 of the Transportation Act.

In the case of *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 180, in considering the duties imposed upon the Interstate Commerce Commission by the Transportation Act, this Court said:

> "Congress distinguished clearly, in framing Transportation Act, 1920, between provisions which were amendments of the Interstate Commerce Act and those which, while relating to railroads, were not. The amendments were grouped under Title IV. The provisions here involved, which related solely to the termination of federal control, were grouped under Title II. Those which provided for the Railroad Labor Board under Title III. Because issuing certificates is not a part of the Commission's delegated power to regulate commerce, and is not an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act is not available to review the legality or correctness of its action in doing so."

Sections 204 and 209 of the Transportation Act are found in title 2 thereof and, by the express declaration of this Court, are not amendments of the Interstate Commerce Act, and the remedies provided for the review of the legality or correctness of the Commission's action under

these Sections are not governed by the Interstate Commerce Act.

This Court further said in the same case at page 180:

> "The function imposed upon the Commission by Section 209 is solely that of determining the amount required to make good the government's guaranty. It is not an exertion of the delegated power to regulate interstate commerce. It is an incident of the World War —a temporary, non-recurrent task, which might appropriately have been performed for the Treasury by its Comptroller or auditors, or by other trusted official."
>
> Great Northern Ry. Co. *v.* United States, 277 U. S. 172, 180.

Thus the functions of the Interstate Commerce Commission in performing this particular temporary, non-recurrent task were such as might have been committed to the Secretary of the Interior or the Secretary of War, or any other official.

After the war the Government had many obligations to meet. Among other things it passed an act, known as the Dent Act, on March 2, 1919 (Chapter 94, 40 Stat. 1272, amended Nov. 23, 1921, c. 137, 42 Stat. 322), to provide relief in cases of contracts connected with the prosecution of the war, and also to provide for the payment of losses suffered by persons by reason of producing or preparing to produce manganese and other specified minerals in compliance with the request and demand of certain departments of the Government. That act is sometimes referred to as the War Minerals Relief Act. Sections 1, 2, 3 and 4 thereof provide for relief to the contractors and protection for the subcontractors. By special provision the Secretary of War was required to report all settlements to the

Congress, and Congress reserved to itself, or agencies appointed by it, the right to review any such settlements, and to the Government the right to recover any money fraudulently paid. By section 2 of that Act the Court of Claims is given jurisdiction to consider the claim of any person who is dissatisfied with the action of the Secretary of War.

By Section 5 of the same Act the Congress committed the administration of the war minerals relief features thereof to the Secretary of the Interior, with power to adjust claims thereunder. Like Sections 204 and 209 of the Transportation Act, and unlike the previous sections of the same Act, where a right of review of the Secretary of War's action is specifically reserved by the Congress, no provision was made for the review of the Secretary of the Interior's action in connection with war minerals relief under Section 5.

What happened in the construction of Section 5 of the Dent Act is a striking example of what this Court holds with reference to the finality of action in connection with these matters, both upon questions of law and fact, where no review is provided.

One Rives presented a claim under Section 5 to the Secretary of the Interior on account of moneys lost by reason of a contract of purchase of a manganese mine, which mine became worthless after the armistice, and upon which he had lost the sum of $9,000.00. The Secretary of the Interior denied this claim because, in his opinion, it did not come within Section 5 as a matter of law, in that Section 5 covered only moneys expended upon property in producing or preparing to produce manganese, and did not include the purchase price thereof. Rives commenced an action in the Supreme Court of the District of Columbia, seeking a writ of mandamus to compel the Secretary

of the Interior to adjust his claim. This proceeding reached the Supreme Court of the United States. In denying the claimant Rives any relief, this Court said:

> "Congress intended the Secretary to act for it, and to construe the meaning of the words used to decribe the elements of the net losses to be ascertained and to give effect to his interpretation without the intervention of the courts. This statute presents a case of as wide discretion as was held to have been vested in the Secretary of the Navy in the Decatur case."

Work *v.* Rives, 267 U. S. 175, 182.

In this same case this Court held, speaking of Section 5, that:

> "Congress did not wish to create a legal claim. It was not dealing with vested rights. It did not, as it did with the claims for supplies and services directly furnished the government under the first and second sections of the act, make the losses recoverable in a court, but expressly provided otherwise. It dealt with the subject with the utmost caution. * * * It vested the Secretary with power to reject all losses except as he was satisfied that they were just and equitable and it made his decision conclusive and final. * * *"

Work *v.* Rives, 267 U. S. 175, 181, 182.

To the same effect:

Work *v.* Chestatee Co., 267 U. S. 185, 187.

As hereinafter shown, the same finality attaches to the certificate of the Interstate Commerce Commission as a

special tribunal under the provisions of Section 212 (a) of the Transportation Act, 1920 (Appendix 32). In the case of *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 53 S. Ct. 28, 31, 32, this Court specifically held a certificate issued under Sections 209 (Guaranty to carriers under Federal control at the time Federal control terminated) and 212 (a) to be final and conclusive under the terms of the Act itself, and also in conformity with the intent of Congress in enacting the same. No distinction of any kind can be made between Section 5 of the Dent Act, and the cases construing it, and Sections 204, 209 and 212 of the Transportation Act, and the cases construing these Sections as hereinafter set out.

After the decision in the case of *Work* v. *Rives*, 267 U. S. 175, above quoted, the Congress, by Act of February 13, 1929, 45 Stats. 1166, authorized the Supreme Court of the District of Columbia to review the final decision of the Secretary of the Interior upon any question of law arising under Section 5 of the Dent Act.

Thereafter the Vindicator Consolidated Gold Mining Company, having been denied a claim based upon its investment in manganese mines, brought an action to review the decision of Secretary Wilbur, the then Secretary of the Interior, in denying a claim similar to that denied Rives in the *Work* case.

This Court affirmed the judgment of the Circuit Court of Appeals in granting the relief, holding that the Secretary of the Interior placed an erroneous construction upon Section 5 in failing to allow such claims, but that the above amendment permitted review on questions of law.

> Wilbur, Secretary, *v.* United States *ex rel.* Vindicator Gold Mining Company, 284 U. S. 231, 234, decided December 7, 1931.

To the same effect and arising out of the same subject matter originally involved in *Work* v. *Chestatee Company*, 267 U. S. 185:

> Wilbur, Secretary, *v.* United States *ex rel.* Chestatee P. & C. Corporation, 53 Sup. Ct. 293, 294, decided January 16, 1933.
>
> Ickes, Secretary, *v.* United States *ex rel.* Chestatee P. & C. Corporation, 53 Sup. Ct. 700, 701, decided May 29, 1933.

The *Work* case was decided March 2, 1925, and prior to the time when Congress had authorized a review of the Secretary's decisions on questions of law. The Congress has never authorized a review of the decisions of the Interstate Commerce Commission in the administration of the railroad relief provided by Sections 204, 209 and 212 of the Transportation Act, and, by parity of reasoning, the rule must be the same as that enunciated in the *Work* case.

This is not a new rule. It was recognized by the Supreme Court of the United States as early as 1851 in the case of *United States* v. *Ferriera*, 13 Howard 39. In that case the Congress, for the purpose of adjusting claims under a treaty with Spain, provided that a Judge of the United States District Court in Florida would investigate claims and submit his findings to the Secretary of the Treasury, who might approve or disallow the award. An attempt was made to appeal from the decision of the judge in the allowance of a claim. This Court said, at page 47:

> "The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award. And an appeal to this court from such a decision, by such an authority from the

judgment of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards of the board of commissioners, under the Mexican treaty, which were recently sitting in this city. * * * *It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an act of Congress.*" (Italics ours.)

United States *v.* Ferriera, 13 Howard (54 U. S.) 39, 47.

To the same effect:

United States *v.* Arredondo, 6 Peters 691, 728.

The above cases are clearly applicable herein, and, in the language of this Court last quoted, where the Congress provides for the adjustment of claims against the Government and commits them to any tribunal for decision, "it cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an Act of Congress." After the Secretary of the Interior denied the manganese claims purely on questions of law, and this Court, in *Work* v. *Rives,* 267 U. S. 175, held his decisions final, the Congress passed a special act authorizing the review of such decisions on questions of law only. Thereafter, in *Wilbur* v. *Vindicator Gold Mining Co.,* 284 U. S. 231, this Court, having then been given the authority to review the decisions of the Secretary on questions of law, found that the Secretary was in error in his interpretation of the law, though Rives had formerly been denied relief under similar circumstances because there was no Act of Congress authorizing a review.

3. THE DECISION OF THE INTERSTATE COMMERCE COMMISSION AWARDING REIMBURSEMENT TO PETITIONER WAS AND IS FINAL AND CONCLUSIVE.

IT CANNOT BE RE-OPENED, REVIEWED, REVERSED OR SET ASIDE, THERE BEING NO SUCH CONCURRENT OR SUBSEQUENT AUTHORIZATION BY ACT OF CONGRESS.

The Circuit Court of Appeals held herein:

> "But, under the admitted facts, its case was not one which the Commission was authorized to consider at all. It has been clearly settled that the Courts have full right when appealed to, to determine by independent hearing, whether agencies of the government to which have been committed duties involving the exercise of administrative functions, or powers of a judicial nature, have exercised their powers with respect to the particular persons or subject matter designated by Congress. If the power is lacking the act is void." (R. 91.)

Undoubtedly, courts have the right to determine originally the purpose and effect of any statute, just as this Court determines the purpose and effect of the provisions of the Constitution of the United States, in any appropriate hearing, independent or otherwise. Such determination becomes the foundation upon which the rights of the parties litigant are to be declared. It is submitted that the courts may have further functions, but this is not necessarily so. Two examples may be given.

If the purpose and effect of the statute, as so determined by the courts, be to vest an agency of the Government with power to construe the statute and apply such construction

to the facts, then the courts cannot be appealed to in the absence of specific statutory provisions for review. Such are the instant case and the case of *Work* v. *Rives,* 267 U. S. 175.

On the other hand, if the purpose of the statute be to vest an agency of the Government with the limited authority of applying the provisions of the statute to the facts in the case under consideration, the courts can again be appealed to, and, in the event that the agency of the Government erroneously construes or applies the statute, the courts may proceed, by review, mandamus, appeal, statutory or otherwise, to correct the error. Such is the case of *Wisconsin Central Ry.* v. *United States,* 164 U. S. 190, cited by the Circuit Court of Appeals herein. (R. 92.)

As this Court said in *Work* v. *Rives,* 267 U. S. 175, 177, 178:

> "Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if it may think it erroneous. The cases range, therefore, from such wide discretion as that just described to cases where the duty is purely ministerial, where the officer can do only one thing, which on refusal he may be compelled to do. * * * Between these two early and leading authorities, illustrating the extremes, are decisions in which the discretion is greater than in the *Kendall Case* and less than in the *Decatur Case,* and its extent and the scope of judicial action in limiting it depend upon a proper interpretation of the particular statute and the congressional purpose."

The Interstate Commerce Commission was given by Section 204, and had, the power and discretion to determine

what carriers were within the Act and entitled to reimbursement, as well as the amount of such reimbursement. The power was not lacking, the determination of the Commission was valid and final, as decided by the courts in the cases herein, and the courts cannot again be appealed to for determination of the correctness of the Commission's action under such power and in accordance with such discretion, there being no statutory provisions for review thereof.

In speaking of the Interstate Commerce Commission, this Court has said:

> "In some matters its duty is merely to investigate and to report facts. (Citing cases.) *In others, to make determinations.* See *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 48 S. Ct. 466, 72 L. Ed. 838. In some, it acts in an advisory capacity. (Citing cases.) In others in a supervisory." (Italics ours.)
>
> United States *v.* Atlanta B. & C. R. Co., 282 U. S. 522, 527.

Moreover, this Court in its decision in *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 48 S. Ct. 466, 72 L. Ed. 838, recognized the application of the principles enunciated in the case of *Work* v. *Rives,* 267 U. S. 175, to Section 209 of the Transportation Act, in the following language:

> "We have no occasion to inquire whether a remedy at law or some other remedy in equity is available. The mere fact that the certificate may be conclusive, if it be a fact, would not entitle the company to a judicial review. Compare United States *v.* Babcock, 250 U. S. 328, 331, 39 S. Ct. 464, 64 L. Ed. 1011; Work *v.* Rives, 267 U. S. 175, 45 S. Ct. 252, 69 L. Ed. 561."

Great Northern Railway Co. *v.* United States, 277 U. S. 172, 182.

And in the case of *United States* v. *Great Northern Railway Co.*, 287 U. S. 144, 53 Sup. Ct. 28, 31, 32, which was a suit by the Government to recover moneys paid to the Great Northern Railway Company under Sections 209 and 212, this Court held that such certificates were final and that such was the intention of Congress.

As to the true construction of Sections 209 and 212, this Court said:

> "Mistake and illegality being thus excluded from the reckoning, we are brought to a second ground for reclamation put forward by the Government. The argument is made that, by the true construction of the statute, a certificate issued by the Commission under section 212 is provisional and tentative; that, upon the issuing of a final certificate of inconsistent tenor, it is superseded and nullified as to the past as well as to the future; and that payments made under its authority, though legal in the making, become illegal by retroaction. We do not so interpret the meaning of the statute. * * *"

United States *v.* Great Northern Ry. Co., 287 U. S. 144, 53 Sup. Ct. 28, 31.

And as to the intention of Congress, after referring to the legislative history of the measure, and the statements by those in charge of it during its consideration in Congress, this Court said:

> "* * * If such recourse be had, there is confirmation of the view that the certificates were more than estimates of provisional advances. Subdivisions a and

b, as originally introduced, drew no distinction as to the effect of payments made thereunder, the certificates being as conclusive under the one as under the other. A proposed amendment to modify subdivision b by making the effect of such certificates *prima facie*, but not conclusive, was carried. 60 Congressional Record, part 3, pages 2815, 2816. A separate proposed amendment to modify subdivision a in substantially the same way was rejected. 60 Congressional Record, part 3, pages 2812, 2815. In the discussion of these amendments, the inquiry was pressed whether the Government would be helpless if the certificates were too high. The answer was emphatic that the certificates were final. 60 Congressional Record, part 3, pages 2739, 2802, 2803, 2809, 2812, 2813."

United States *v.* Great Northern Ry. Co., 287 U. S. 144, 53 Sup. Ct. 28, 32.

Since Section 212 has to do with certificates issued under Section 204, as well as under Section 209, it would follow that this Court has established the conclusiveness and finality of certificates issued by the Interstate Commerce Commission under these Sections.

This Court furthermore has expressly held that the Government is precluded from recovering payments made to carriers under Federal control at the termination of Federal control under Section 209 (Guaranty section), and Section 212, and has expressly distinguished the case of *Wisconsin Central Ry. Co.* v. *United States,* 164 U. S. 190, and similar cases (cited by the Circuit Court of Appeals herein, R. 92), in the case of *United States* v. *Great Northern Ry. Co.,* 287 U. S. 144, 53 S. Ct. 28, 31. In that case the Court said:

"In these circumstances we find no basis for a hold-

ing that the payment made to the respondent under the partial certificate of March 1, 1921, was due to any mistake of fact, either unilateral or mutual. United States *v.* Barlow, 132 U. S. 271, 280, 281, 10 S. Ct. 77, 33 L. Ed. 346. Cf. Gordon *v.* Butler, 105 U. S. 553, 557, 558, 26 L. Ed. 1166. The officials of the government knew precisely what they were doing, and kept well within the statute defining their authority. They did not act illegally like the officials whose acts were challenged in the cases cited by the petitioner. Wisconsin Central Railroad Co. *v.* United States, 164 U. S. 190, 17 S. Ct. 45, 41 L. Ed. 399; Grand Trunk Western Railway Co. *v.* United States, 252 U. S. 112, 40 S. Ct. 309, 64 L. Ed. 484; Burnet *v.* Porter, 283 U. S. 230, 51 S. Ct. 416, 75 L. Ed. 996. Charged with a difficult task exacting judgment and discretion, they came to a decision in good faith with knowledge of the relevant facts and without departure from the law. If the payment under their certificate is to be reclaimed, some other ground than mistake or illegality must be found to sustain the reclamation."

Since, as has been heretofore shown, the Commission was given power under Sections 204 and 212 to construe the statute and determine the facts, *to wit:* To determine what carriers came within the provisions of Section 204, as well as the amount of reimbursement to be awarded to each (compare *Work* v. *Rives,* 267 U. S. 175, *United States* v. *Ferriera,* 13 Howard 39), then the Commission kept within the authority granted it and did not depart from the law, and did not act illegally. An erroneous and unwarranted construction of the statute as alleged in the complaint, if the construction be erroneous and unwarranted, which is not conceded, made by the agency of

the Government having authority to construe the statute, is not such an illegality as is contemplated by the above language of this Court. Since no mistake of fact was alleged herein and no illegality appears herein, because the legality of the construction depends on the authority to construe, there is nothing in the instant case to permit a review by the courts, statutory or otherwise, or to sustain reclamation.

In the broad principle, the instant situation is not unlike *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 53 Sup. Ct. 28, 30 (decided November 7th, 1932), where this Court dealt with the question of difference in matters of opinion. There the railroad filed its claim with the Commission under Section 209, and was paid $12,500,000. Later the Commission revised its judgment and determined that the railroad was entitled to a lesser sum and had been overpaid by the difference. Demand was made, as here, on the railroad, with resulting suit by the United States. In denying recovery this Court said: *"Mistake also there was none, but merely a revision of judgment in respect of matter of opinion."* (Italics ours.)

Parenthetically, no fraud is alleged or appears herein as ground for relief.

Nor is the decision of this Court in the case of *Continental Tie & Lumber Co.* v. *United States,* 286 U. S. 290, inconsistent with the rule that the power and jurisdiction of the Interstate Commerce Commission under Section 204 was judicial in character and not ministerial by reason of the fact that this Court in its opinion in that case, at page 295, held that:

> "* * * The petitioner correctly states that at the date of the Act's adoption no railroad had a vested right in any amount; until the Commission made an award nothing could be paid, no proceeding was avail-

able to compel an allowance, or to determine the elements which should enter into the calculation. In short, says the petitioner, the carrier had no rights, but was dependent solely upon the Commission's exercise of an unrestrained discretion, and until an award was made nothing accrued. But we think that the function of the Commission under the act was ministerial, to ascertain the facts with respect to the carrier's operating income by a comparison of the experience during the test period with that during the term of Federal control. The right to the award was fixed by the passage of the Transportation Act. What remained was mere administrative procedure to ascertain the amount to be paid. Petitioner's right to payment ripened when the act became law. What sum of money that right represented is, of course, a different matter."

The above statement was made in connection with the discussion as to when the reimbursement accrued to the carrier under Section 204 so as to fix the year in which the amount should be returned as income under the Federal Income Tax Law. Obviously the right to the award was fixed by the passage of the Transportation Act. The calculation and accounting necessary to determine the amount of the award might be called ministerial, but when so stated no point was made in the decision as to whether the jurisdiction and power then being exercised was of a ministerial or of a judicial character as herein otherwise discussed. Nevertheless both the determination of the carrier entitled to the award and the amount of the award were referred to the Interstate Commerce Commission for decision.

If it should be argued that the *Continental Tie* case, 286 U. S. 290, goes further than this, it is respectfully submitted that the rule is clarified by the later decision of

this Court in the case of *United States* v. *Great Northern*, 287 U. S. 144, 53 S. Ct. 28, hereinbefore discussed, wherein methods of calculation were used by the Interstate Commerce Commission which were later revised by the Commission itself, but this Court held that the award under the former methods of calculation was final and conclusive and not subject to review by the Commission or by any court because such was the meaning of the Act and such was the intention of Congress.

The statute fixed the right but did not designate the recipient. Congress by Sections 204 and 209 of the Transportation Act gave to the Interstate Commerce Commission power and jurisdiction to determine the recipients and to ascertain the amount of reimbursement to each. Congress could have provided for appeal to the courts from, or other review of, the decision of the Interstate Commerce Commission, but did not do so. The decision of the Interstate Commerce Commission became final whether the duty be denominated judicial or ministerial.

In *United States* v. *Arredondo*, 6 Peters, 691, 728, 8 L. Ed. 563, this Court said:

> "It is a universal principle that where power *or jurisdiction is delegated to any public officer or tribunal over a subject matter* and its exercise is confided to his or their discretion, *the acts so done are binding and valid as to the subject matter* and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public or any person denying its validity, *are power in the officer and fraud in the party. All other questions are settled by the decision made or the*

act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for or other revision by some appellate or supervisory tribunal is prescribed by law." (Italics ours.)

Again it may be asserted that the rule of the *Work* case (*Work* v. *Rives*, 267 U. S. 175) is to be distinguished from the rule to be applied in the case at bar for the reason that in the *Work* case the Secretary of the Interior was considering items to be reimbursed, to wit, money expended on a contract to purchase land valuable for manganese, whereas in the case at bar the Interstate Commerce Commission was called upon to decide whether the petitioner was such a carrier as came within the terms of Section 204. But it must be remembered that the item to be reimbursed in accordance with the decision of the Secretary of the Interior in the *Work* case identified the recipient of the reimbursement, and the determination of the Secretary of the Interior that the item was not to be reimbursed was a determination that the claimant who expended money for that item was not entitled to reimbursement. In the case at bar the item to be reimbursed under Section 204 was the decrease in railway operating income in the Federal control period as compared to the railway operating income during the test period. Thus the item to be reimbursed identifies the carrier entitled to reimbursement and, therefore, no distinction can be drawn between the rule in the *Work* case and the rule which should be applied in the case at bar.

The Interstate Commerce Commission under the statute was constituted a court to deal with petitioner's and kindred claims. It had jurisdiction to consider them. The test of the Commission's jurisdiction is whether it had power to enter upon the inquiry, which concededly it had, and not whether its conclusions in the course of such in-

quiry were right or wrong, for if the law confers the power to render a judgment in a particular case, then the court has jurisdiction. It is not whether good cause exists for granting relief, but whether the tribunal had power to determine by inquiry whether it would grant relief or not.

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits. * * * Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction."
>
> General Investment Co. *v.* N. Y. C. R. R., 271 U. S. 228.

The gist of the action is that the construction placed by the Interstate Commerce Commission on the word "deficit" as used in paragraph (a) in *Construction of the Word "Deficit,"* (66 I. C. C. 765) was "an erroneous and unwarranted construction" not in harmony "with the accepted use of said word," or of its "use as found elsewhere in said Transportation Act." In other words, the complaint simply charges, not fraud, not mistake of fact, not mistake of law, not lack of power, but solely "erroneous and unwarranted construction."

The construction is not erroneous, because it is a proper construction and conforms to the legislative intent, as hereinbefore shown.

However, an erroneous and unwarranted construction of the law or the facts is no basis for setting aside the

decision and award of reimbursement. Congress invested the Commission with the power and directed it to investigate, examine into and finally and conclusively determine the validity and amount of each claim presented. Congress knew the Commission was composed of human beings who might err in judgment, yet it was selected "because", in the language of this Court in the case of *Great Northern Railway Company* v. *United States*, 277 U. S. 172, 180, "of its special fitness * * * knowledge of railroads and experience in railroad accounting * * * custody of the records of railroad operations and its staff competent to make speedily the necessary investigations."

Its certificate was final. *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144, 53 Sup. Ct. 28, 31, 32. Having the power to act, it had the power to decide. The jurisdiction to decide carried with it the power to decide honestly either correctly or erroneously. If the Commission decided wrongly, it did not usurp an unconferred jurisdiction, because the authority to determine in no wise depends on the nature or correctness of the decision rendered. Men are so fallible, and human discernment so imperfect, that the power to hear and finally determine necessarily carries with it the power which makes the determination obligatory without reference to the question whether it be right or wrong. Controversies must come to an end some time. No case can be found where a determination of the character involved herein has been set aside in a collateral action on the ground of error of judgment as respects either fact or law on the part of the tribunal rendering it.

In *United States* v. *Wildcat*, 244 U. S. 111, this Court held that an error of judgment was not ground for setting aside a quasi-judicial determination, because:

"A correct conclusion was not necessary to the

finality and binding character of its decisions. It may be that the Commission in acting upon the many cases before it, made *mistakes which are now impossible of correction.* This might easily be so, for the Commission passed upon the rights of thousands claiming membership in the tribe and ascertained the rights of others who did not appear before it, upon the merits of whose standing the Commission had to pass with the best information which it could obtain.

"When the Commission *proceeded in good faith to determine the matter* and to act upon information before it, not arbitrarily, but according to its best judgment, we think *it was the intention of the act that the matter, upon the approval of the Secretary should be finally concluded and the rights of the parties forever settled,* subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake." (Italics ours.)

To the same effect:

United States *v.* Moser, 266 U. S. 236, 242.
United States *v.* California & Oregon Land Co., 148 U. S. 31.

The error in the decision of the Circuit Court of Appeals herein is further demonstrated by decisions of the Court of Claims and the Court of Appeals of the District of Columbia, directly in point as involving the finality of, and lack of provision for review of, decisions rendered by the Interstate Commerce Commission under Section 204.

While these decisions do not, perhaps, have the weight of ultimate authority in this Court, even though petitions for writs of certiorari were denied by this Court in each case, they are very persuasive herein.

For example, the Court of Appeals of the District of Columbia held:

> "We have reviewed this case at considerable length, in order that the numerous errors committed by the commission, growing out of its refusal to treat the combined lines as a 'system of transportation,' may become apparent. These errors, however, we are unable to correct in this proceeding. This is not a case where the commission has, for any reason, refused to assume jurisdiction of the case, as in Kansas City Southern Railway Co. *v.* Interstate Commerce Commission, 40 S. Ct. 187, 252 U. S. 178, 64 L. Ed. 517; but it falls within our holding in U. S. *ex rel.* Abilene & Southern Railway Co. *v.* Interstate Commerce Commission, 8 F. (2d) 901, 56 App. D. C. 40. *The Commission has construed the statute and applied its construction to the facts, and, however erroneous its conclusions, under recent decisions of the Supreme Court, are beyond our jurisdiction to correct in this proceeding.*" (Italics ours.)
>
> United States *ex rel.* C. C. etc. Ry. *v.* Interstate Commerce Commission, 11 Fed. (2d) 554, 556 (*Certiorari* denied, 273 U. S. 706).

To the same effect:

Wyandotte Terminal R. R. Co. *v.* United States Court of Claims, 64 Court of Claims, 328 (*Certiorari* denied, 276 U. S. 630);

United States *ex rel.* Abilene, Etc., Ry. Co. *v.* Interstate Commerce Commission, Court of Appeals of the District of Columbia, 8 Fed. (2d) 901, 902 (*Certiorari* denied, 270 U. S. 650);

United States *ex rel.* Empire & S. E. Ry. Co. *v.* Interstate Commerce Commission, Court of Ap-

peals of the District of Columbia, 45 Fed. (2d) 293, 294 (*Certiorari* denied, 283 U. S. 834).

And to the same effect in construing Section 209:

Northern Pacific Railway Company *v.* Interstate Commerce Commission, Court of Appeals of the District of Columbia, 23 Fed. (2d) 221, 223 (*Certiorari* denied, 275 U. S. 572).

True, these cases were cases where the Commission had denied relief to the claimant and the claimant was attempting to obtain relief in the courts. These courts, following the rules announced by this Court in other cases, held that the action of the Commission, no review having been authorized by Congress, was final and conclusive.

This Court should determine whether the citizen is to be bound by the decisions of the Commission in this class of cases because the Congress provided no right of review, while the Government of the United States is to be given that right.

The fact that other railroads were later denied reimbursement under identical circumstances and conditions should be immaterial. The petitioner and other railroads which received reimbursement are entitled to retain the same. If other railroads similarly situated have been denied reimbursement under later decisions of the Interstate Commerce Commission, Congress may afford relief by amendment to permit appeal or review on questions of law, as was done in connection with the War Minerals Relief Act following the decision in the case of *Work* v. *Rives* (267 U. S. 175).

The error in the decision of the Circuit Court of Appeals in this connection is further clearly demonstrated by an analysis of the decisions of this Court, cited by that Court to sustain its statement that:

"It has been clearly settled that the Courts have full

right when appealed to, to determine by independent hearing, whether agencies of the government to which have been committed duties involving the exercise of administrative functions, or powers of a judicial nature, have exercised their powers with respect to the particular persons or subject matter designated by Congress. If the power is lacking the act is void." (R. 91, 92.)

The cases are:

Crowell *v.* Benson, 285 U. S. 22;
Interstate Commerce Commission *v.* Ill. Cent. R. R., 215 U. S. 452;
Southern Pacific Co. *v.* Interstate Commerce Commission, 219 U. S. 433;
Interstate Commerce Commission *v.* Union Pacific R. R., 222 U. S. 541;
Tagg Bros. & Moorehead *v.* United States, 280 U. S. 420, at page 442.

It is respectfully submitted that not one of these cases has any bearing on the question involved, and that the decisions of this Court hereinbefore discussed are controlling. As already shown under the holding of this Court in the case of *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 180, the Commission under Section 204 was not acting as the Interstate Commerce Commission but as a special tribunal.

The Circuit Court of Appeals fell into error by assuming that Section 204 of the Transportation Act was an amendment of the Interstate Commerce Act, in stating (R. 84) that:

"The Transportation Act, approved February 28, 1920 (41 Stats. page 456), which amended the Interstate Commerce Act, provided (Sec. 204) that the Fed-

eral control of the railroads should terminate on March 1, 1920."

Section 204 of the Transportation Act is not an amendment of the Interstate Commerce Act, nor any part of the Interstate Commerce Act, and the procedure to be followed in determining the rights of claimants and of the Government under Section 204 is not governed by the Interstate Commerce Act. This Court has said so in the case of *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 180, as follows:

> "Congress distinguished clearly, in framing Transportation Act, 1920, between provisions which were amendments of the Interstate Commerce Act and those which, while relating to railroads, were not. The amendments were grouped under Title IV. The provisions here involved, which related solely to the termination of federal control, were grouped under Title II. Those which provided for the Railroad Labor Board under Title III. Because issuing certificates is not a part of the Commission's delegated power to regulate commerce, and is not an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act, is not available to review the legality, or correctness of its action in doing so."

Notwithstanding these declarations by this Court, showing clearly that the Interstate Commerce Act had no relation to the functions of the Interstate Commerce Commission in the adjustment of these railroad claims, still the Circuit Court of Appeals cited the three Interstate Commerce Commission cases to sustain its right to review the action of the Commission. That Court also cited *Crowell* v. *Benson*, 285 U. S. 22, a case arising under the Longshoremen's and Harbor Workers' Compensation Act (March

4, 1927, c. 509, 44 Stat. 1424). Section 21 of that Act provides for a review by the court, and that case itself expressly recognizes this fact. Again, the Circuit Court of Appeals cited in support of its conclusion *Tagg Bros. & Moorehead* v. *United States,* 280 U. S. 420, a case arising under the Packers' and Stockyards' Act (August 15, 1921, c. 64, Sec. 301 to 316, 42 Stat. 163). Section 316 of that Act specifically provides for a review of all orders in connection therewith, in the same manner as orders made by the Interstate Commerce Commission as such.

In treating Section 204 as an amendment to the Interstate Commerce Act, the Circuit Court of Appeals no doubt assumed that the orders of the Commission were reviewable under the Interstate Commerce Act as such.

The cases cited by the Circuit Court of Appeals, as heretofore pointed out, have no application to the question of a review of the award of reimbursement to petitioner because they are cases where a review was specially provided by the Act of Congress in each case, where none is provided in the instant case.

It is, therefore, respectfully submitted that the Circuit Court of Appeals herein erred in affirming the judgment of the District Court in reviewing the decision of the Interstate Commerce Commission and in sustaining reclamation herein, in view of the decisions of this and other courts, hereinbefore discussed, and that there is no support for the same in the cases cited by that Court.

4. THE INTERSTATE COMMERCE COMMISSION HAD NO POWER TO RESCIND AND SET ASIDE ITS AWARD OF REIMBURSEMENT—*A FORTIORI,* IT HAS NO SUCH POWER AFTER ITS PERSONNEL HAD BEEN CHANGED.

The third affirmative defense is based upon the fact that the personnel of the Interstate Commerce Commission

changed between the award of reimbursement to petitioner (94 I. C. C. 617), and its attempted rescission and setting aside of the same (117 I. C. C. 780) and that such action was not within its power (R. 54).

This court will take judicial notice of the personnel of the Commission, the time of accession to office and the term of office (*N. Y. & M. P. L. R.* v. *Winans*, 58 U. S. 30, 40), and will therefore note that between the decisions of the Interstate Commerce Commission construing the word "deficit" in Section 204 in 1922 (66 I. C. C. 765), and in 1925 (99 I. C. C. 724), two of the Commissioners who determined the earlier case were succeeded by two new Commissioners in the determination of the second case. The two new Commissioners by their vote in the later case changed the interpretation; their two votes made a majority; their votes would have made a majority either way.

Certainty is of the very essence of the law. Shifting and changing rules or principles do not constitute law. In our system of Government where changes of officers are so frequent, it is of great importance that there shall be no right in a new officer to reverse the decisions of his predecessors. Unless this principle is followed, administrative and judicial action would become involved in chaos; hence the reason for the rule of finality.

> Grifenhagen *v.* Ordway, 218 N. Y. 481;
> Walling *v.* Brown, 76 Pac. (Idaho), 318;
> Francis Palms, *et al.*, 7 Land Decisions 147.

If the position of the Government is sound in the instant case each succeeding Commission may make and revoke certificates and treat petitioner's claim as constantly before it.

Furthermore, it does not avail the Government herein that the Commission attempted to reverse its decision and

award, and rescind its settlement with petitioner. The principles hereinbefore discussed, denying to the courts the authority to review decisions of the Commission herein, are equally prohibitive of any subsequent action by the Commission itself. The finality attached to the certificate itself under Section 212 (a) and as intended by the Congress (compare *United States* v. *Great Northern Ry. Co.*, 287 U. S. 144; 53 Sup. Ct. 28, 31, 32), precludes such subsequent action. Nor does Title II of the Transporation Act (Appendix 21), by amendment or otherwise, contain any statutory provision authorizing the Commission to grant rehearings and correct miscalculations. (Compare *Work* v. *Rives*, 267 U. S. 175, 180, 182).

5. THE REIMBURSEMENT PAID TO PETITIONER WAS IN NO SENSE A SUBSIDY OR BONUS, AND THE GOVERNMENT HAS NO OTHER OR BETTER RIGHT THAN ANY INDIVIDUAL TO RECLAIM THE SAME.

THE MONEY *EX AEQUO ET BONO* BELONGS TO PETITIONER.

The Circuit Court of Appeals herein held (R. 92):

> "The United States may demand repayment of money paid out by its officers or agents where no authority of law exists for such payment. Persons so receiving public funds are charged with knowledge that they have taken that to which they have not the right, and are bound, upon demand, to return it. Decisions determining the question differently where private parties are wholly concerned, are not pertinent. No estoppel as for voluntary payment can be claimed to defeat the suit of the Government."

The Circuit Court of Appeals thus decided that the question herein might have been determined differently were private parties wholly concerned. This was error. This Court has held that the rules of law which apply to the Government and to individuals are the same. This Court, in *McKnight* v. *United States,* 98 U. S. 179, 185, said:

> "It is true the assignment was contrary to law, and therefore, a nullity, but there was nothing contrary to good morals or conscience in the payment or receipt of the money. The facts were all known. There was no indirection, concealment, or improper purpose on either side. * * * Under the circumstances, it is quite clear that if the controversy were between private parties, there could be no recovery. I Story, Contract, Sect. 541. With a few exceptions, growing out of considerations of public policy, the rules of law which apply to the Government and to individuals are the same. There is not one law for the former and another for the latter."

Again, in *United States* v. *Hill,* 120 U. S. 169, 182, action was brought by the Government to recover damages for defendant's failure as a clerk of court to account for certain fees he had received. In denying recovery, this Court said:

> "With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires a return of the disputed fees, judges of eminence, heads of departments, and accounting officers of the Treasury having concurred in an interpretation in which those concerned have confided, the surety in the present bond, as well as his principal, had a right

to rely on that interpretation in giving the bond; and the semi-annual accounts of the principal having been actually examined and adjusted at the Treasury, with the naturalization fees excluded, down to and including the one last rendered five months before this suit was brought, *a court seeking to administer justice* would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, *reopen what had been settled with such abundant and formal sanction. This principle has been applied, as a wholesome one, for the establishment and enforcement of justice, in many cases in this court, not only between man and man, but between the government and those who deal with it, and put faith in the action of its constituted authorities, judicial, executive and administrative.*" (Italics ours.)

In view of the above decisions of this Court, it is submitted that the decision of the Circuit Court of Appeals was based upon an erroneous assumption that the question should be decided differently, where the Government is involved.

Continuing, the Circuit Court of Appeals herein said (R. 93):

"No conditions are present like those where a person has contracted with a Government agency and received payment in return for a consideration actually rendered by him (as the performance of work) and it has later been discovered that the contract was not legally authorized. Here the railroad company returned nothing to the Government in exchange for the money received. * * *"

This Court in two recent cases decided on May 16, 1932, *Texas & Pac. Ry. Co.* v. *United States*, 286 U. S. 285, 289, considering Section 209, and *Continental Tie & Lumber Co.* v. *United States*, 286 U. S. 290, 293, considering Section 204, has specifically held otherwise.

In the latter case this Court said:

> "What we have said in Texas & Pacific Railway Co. *v.* United States, decided this day, 286 U. S. 285, is determinative of the first contention. Section 209 of the Transportation Act (49 U. S. C. A., Sec. 77) guaranteed the payment of any deficiency below a fixed minimum of operating income for the six months ensuing the termination of Federal control to railroads which had been taken over by the United States. By the terms of Section 204, payment was to be made to railroads not under Federal control of a proportion of any operating deficit suffered in the period of such control. The underlying purpose of Congress was the same in both cases. Railroads falling within Section 204 were principally short lines. They were known to have suffered serious losses in income due to routing arrangements and other administrative measures made necessary by government operation of the larger railroad systems. The Transportation Act did not contemplate that the payments to be made pursuant to Section 204 were in any sense just compensation for the taking of property. There was no room for such reimbursement, as the short lines were during the time to which the section applied in the possession and management of their owners. Congress, nevertheless, realized that Federal operation had caused them consequential losses, at least partial redress for which was the purpose of the section where actual deficits in income had resulted. For the reasons set forth in Texas & Pacific Ry. Co. *v.*

United States, *supra*, we hold that these payments were not subsidies or bonuses, but were income within the intent of the amendment and the statute."

Continental Tie & Lumber Co. *v.* United States, 286 U. S. 290, 293.

These cases arose under the Federal Income Tax Law, and considered the question as to whether the payments made under these sections to the railroads were subsidies or taxable income, and in both cases it was held that such payments were taxable income. If the railroads had surrendered nothing in exchange for such payments, they could not have been considered income, and therefore, the question was directly involved and the error is clear.

The Circuit Court of Appeals herein further said (R. 93):

"Plaintiff had only to show that the money was improperly paid as described. What use appellant thereafter made of it is immaterial. No estoppel can be claimed because it disbursed the fund and was taxed because of the possession and claimed ownership of it. The decisions cited affirming the right of the United States to recover public money so paid out without authority of law, as a corollary must imply that there is no estoppel under conditions such as this case presents."

The following statement of the true rule runs through all of the cases:

"To say that a plaintiff can recover money paid by mistake notwithstanding the recovery will throw a loss upon the defendant provided the plaintiff is under no obligation to the defendant, is to lose sight of the grounds upon which a recovery is allowed—namely,

that the defendant has money which in conscience he cannot keep. It seems difficult to establish in a case where the defendant cannot be said to be more responsible for the mistake made by the plaintiff than is the plaintiff himself, that he should in conscience return to the plaintiff money paid under mistake, where the result of such repayment is to throw a loss upon the defendant which he would not have suffered had not the payment been made. The principal that forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself against loss at the expense of an innocent and blameless defendant."

Keener on Quasi-Contracts, page 67.

The second affirmative defense (R. 50) deals with the changed *status in quo* of petitioner brought about by its having filed its claim under Section 204 at the invitation of the Government, its having incurred large outlays for attorneys and accountants in connection therewith, and in the payment of taxes as a result thereof and, finally, its having distributed the proceeds of said claim in the form of dividends to its stockholders as a result of which petitioner now, if called upon to make good the amount so received under the circumstances, would be unable to so do and would be wholly insolvent. Under these circumstances in equity and good conscience, petitioner should not be now compelled to satisfy this demand of the United States.

The proceeding invoked by the United States is an action at law wherein the doctrine of quasi-contract is invoked on the theory that money was paid to petitioner by reason of mistake. That, notwithstanding the absence of any wrong, or of any promise expressed, or implied, to return it, petitioner in equity and good conscience should

not be permitted to retain this money and thereby unjustly enrich itself at the expense of the Government.

Under proper circumstances, such an action in implied *assumpsit* will undoubtedly lie. However, it must appear before a recovery will be permitted, that the results have visited no inequities or injustice upon innocent defendants. Where, as here, the United States seeks a recovery from petitioner in this kind of an action the fact that petitioner has changed its position, to its damage, as a result of the voluntary payment of the sum in question by the United States, and the fact that petitioner cannot now be placed in *statu quo*, constitutes a complete bar to the right of recovery in this proceeding.

The title to the sum paid petitioner by the Government vested in petitioner, which had a perfect right to use and treat it as its own funds without regard to any future claim for return that might be made by the United States. In this connection it is well to point out that substantially two years elapsed after the receipt of this sum by petitioner before the Interstate Commerce Commission attempted to revoke its order and cancelled the claim of the petitioner. (R. 2.)

Upon receipt of the sum in question petitioner dealt with it properly. It paid the expenses incident to the successful prosecution of its claim; it paid out other sums for taxes and in the operation and maintenance of its railroad, and it distributed out of the moneys so received by way of dividends a large sum to its stockholders. All these amounts so paid out and distributed have been lost to petitioner.

Where a city purchased the plant of a water company and the company thereupon distributed the money to the stockholders, and it was discovered that by mistake the city had paid the company $2,000.00 in excess of the agreed

price, the Court held that, the stockholders having rightfully received the money, it could not be recovered. The Court said:

> "It is true that the assets of a company cannot ordinarily be divided among those entitled until the corporate existence ceases, since they constitute a trust fund for the protection of creditors, and an attempt to improperly divert the funds of the continuing organization may be restrained. (Citing cases.) But payments clearly not intended to defraud, but delivered in good faith, when the company is believed to be solvent, no rights of the creditors being impaired, are proper. (Citing cases.) Distributions mistakenly made may be retained as against subsequent creditors. * * * It is true that money paid by mistake may be recovered back, even though the one making it may have been negligent * * *, but this is not so when the position of the parties has in the meantime been changed."
>
> Borough of Mount Union *v.* Kunz, 139 Atl. (Pa.), 118, 120.

To the same effect:

> Atlantic Coast Line R. Co. *v.* Schirmer, 69 S. E. (S. C.), 439, 440.

In *Walker* v. *United States*, 139 Fed. 409 (Aff'd 148 Fed. 1022), it was held that where a marshal has in good faith rendered accounts against the United States, covering service of his deputies, which have been audited and allowed by the proper accounting officers, and paid in accordance with the rules which had previously been recognized as governing such allowances and with knowledge that the greater part of the money would be paid over to

the deputies rendering the services, the Government is not entitled to recover the sum so paid the marshal, after years have elapsed and he has gone out of office, even though the allowance may have been made under an erroneous construction of the law. The Court said at page 413:

> "The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man."

In view of the recent decision of this Court in the case of *Continental Tie & Lumber Company* v. *United States*, 286 U. S. 290, that the award under Section 204 is income, constituting reimbursement to short line railroads for losses sustained by reason of government control of railroads, the loss being recognized and the moral obligation being fulfilled, in equity and good conscience petitioner should retain the reimbursement awarded and the Government should not be permitted to recover back the money paid.

The loss to petitioner, for which it was reimbursed, is just as much a loss, though a decrease in railway operating income during the Federal control period as compared to the test period, as if solely a loss during the Federal control period.

The equities in the instant case are wholly in favor of petitioner and against the United States. There is no way known to the law in this character of action by which petitioner can be placed in *statu quo* in face of the allegations contained in its amended answer and such being the case

the answer states a complete defense to the claim of the Government.

Appropriate here on this subject is the language of the court in *Hilborn* v. *United States,* 27 Ct. Cls., 547 (affirmed in 163 U. S. 342), which deals with the right of the Government to recover back fees paid to a district attorney because of an erroneous interpretation of a statute. In denying the right of the Government to recover the payment, the Court said:

> *"In our opinion when money is paid after careful consideration of the law and facts by such high officials and upon settlements made by the accounting officers it cannot be held that the district attorney received money under such circumstances that in equity and good conscience he ought not to retain it although it may appear that all these public officers were mistaken in their interpretation of the statutes and that he was not in law entitled to the compensation."* (Italics ours.)

The money in controversy *ex aequo et bono* does not belong to the Government; it belongs to the petitioner.

6. THE PAYMENT OF THE MONEY TO PETITIONER WAS THE RESULT OF A COMPROMISE AND SETTLEMENT.

The Circuit Court of Appeals herein held (R. 92):

> "The added contention of appellant that the settlement made was one of compromise does not make a different case because the railroad company was not entitled to any amount under the facts as admitted."

This Court has held in the case of *United States* v. *Justice,* 81 U. S. 535, 549, that:

"It is always in the power of parties to compromise their differences. One way of doing this is by arbitrators, mutually chosen, but from such submission neither party is at liberty to withdraw after the award is made. The condition of the Government creditor is better than this, for if dissatisfied with the allowance made him by the commission, he can refuse to receive it, or can accompany his receipt of it, if he chooses to take it, with a proper protest. This protest is necessary to inform the Government that the compromise is rejected, and that this rejection leaves the claimant free to litigate the matter in dispute before the Court of Claims. If with this knowledge and under these circumstances the money is paid, there can be no just cause of complaint *on either side,* and the status of the parties is not affected by anything which transpired before the commission." (Italics ours.)

Had this controversy arisen between individuals there would not have been the slightest basis for the maintenance of this action.

The first affirmative defense (R. 42) rests upon the proposition that petitioner filed its claim under Section 204 before the Interstate Commerce Commission in the sum of $600,527.35 and demanded a finding allowing the same in that amount and certification thereof to the Treasury of the United States for payment; that thereafter the Government after investigating the claim of petitioner made an offer of compromise in the language set forth in the amended answer (R. 44-45); that to this offer of compromise was attached a blank form of acceptance to be executed by petitioner which provided that the latter should accept the offer so made "in settlement of all claims

against the Government under said Section 204" (R. 46); that petitioner executed said acceptance and release and as a result of such offer of compromise and acceptance and release, the United States paid to petitioner the sum of $487,116.31, petitioner having released its claim of upwards of $112,000 in excess of the amount received.

No more direct, positive example of compromise and settlement could possibly be imagined and, under the law as between private individuals, no doubt could arise as to the right of the petitioner to retain the money so received.

And, as previously shown, the rule is well recognized and has been frequently stated by this Court that, with few exceptions, rules of law apply to the Government and individuals alike; there is not one law for the former and another for the latter.

This defense has its foundation in that principle of the law which is stated as follows:

> "With the courts of this country, the prevention of litigation is not only a sufficient, but a highly favored consideration; and no investigation into the character or value of the different claims submitted will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties entering into the compromise thought at the time that there was a question between them.
>
> "So giving up a suit or any *equivalent proceedings*, instituted to try a question of which the legal result is doubtful, is a good consideration for a promise to pay a sum of money for an abandonment thereof. And in these cases inequality of consideration does not constitute a valid objection; it is enough if there be an actual controversy, of which the issue may fairly be considered by both parties as doubtful." (Italics ours.)

Parsons on Contracts, Ninth Edition, Vol. 1, page 477.

To the same effect:

Kiefer Oil & Gas Co. *v.* McDougal, 229 Fed. 933.

This rule was followed in considering a claim arising under the Dent Act (War Minerals Relief Act, 40 Stat. 1272), where the Court of Claims used the following language:

"The conclusive character of an award by the Secretary and acceptance by the claimant was considered by this Court in Delaine Mills *v.* United States, 57 Ct. Cls., 453; and although that was an attempt by a claimand to secure further relief, and its right to further proceed in this court was under consideration, it was pertinently said by the Chief Justice, speaking for the court: 'But when the matter has been presented to the Secretary, or the board organized by him to hear and consider it, and an adjustment is offered and accepted as in this instance, there is no basis for further proceedings in the Court of Claims. A salutary purpose of the Dent Act was to produce adjustments and settlements of a specified character of claims and not merely to produce or foster litigation. If the party accept the award, the purpose of the act is accomplished, and there is no need of further litigation.' See Nassau Smelting & Refining Works, Ltd., *v.* United States, decided by the Supreme Court, November 17, 1924 (266 U. S. 101).

"A claimant being estopped from any further remedy by acceptance of an award, a theory which was invoked by the government in the Delaine Mills case, it seems but a just application of the same principle

to hold the Government equally bound, unless, of course, it has been 'defrauded'."

Standard Steel Car Co. *v.* United States, 60 Ct. Cls. 726.

In the case of *D'Olier Engineering Co.* v. *United States,* 244 Fed. 90, the Circuit Court of Appeals for the Third Circuit had under consideration a settlement made by the Government with the plaintiff in connection with the furnishing of boilers in the plants of the Panama Canal. It appears that the Government was to pay a stipulated price for the boilers, based among other things on a rating of 72 per cent. efficiency. After the installation of the boilers, a test was to be made by a Government engineer and a representative of the plaintiff and settlement made thereon. An admitted mistake was made by the engineers, and the boilers were overrated to the extent that the plaintiff was overpaid some thousands of dollars more than it would have been had the rating been made in accordance with the contract. An action was brought by the Government to recover the amount so paid. The lower court, while recognizing the principle of compromise, found that the money was not paid "in compromise of a claim in dispute" and authorized a recovery on the part of the Government. On appeal the Circuit Court of Appeals vacated the judgment and said:

"It will thus be noted that this action at law while in form for the recovery of money mistakenly paid under the contract of November 17, 1908, is in reality the annulling of the settlement of February 28, 1910, so made by the parties, of all matters in dispute under said contract. This suit is not to enforce any contract, express or implied, but it seeks to invalidate a settlement contract that has already been performed, and

that without either the willingness expressed or the power possessed to restore the parties to their previous status. By this suit, the Government forecloses and excludes all those equitable considerations and plastic powers which a chancellor could exercise were this a bill to rescind the agreement of settlement."

D'Olier Engineering Co. *v.* United States, 244 Fed. 90, 94.

If the petitioner was not entitled to the money awarded to it by virtue of this compromise and settlement, the Government has pursued the wrong remedy. This is an action at law and, in the language of the Circuit Court of Appeals in the *D'Olier Engineering Case* (244 Fed. 90, 94):

> "By this suit the government forecloses and excludes all those equitable considerations and plastic powers which a chancellor could exercise were this a bill to rescind the agreement of settlement."

In other words, if the Government has any remedy in the premises, it must seek relief in a court of equity where the court, in the exercise of its equitable powers in a proper case, may set aside the settlement, and the award made pursuant thereto, and then proceed to do equity between the parties.

It is the universal rule that settlements and awards, as well as judgments, even though erroneously made or entered, cannot be ignored and an action at law maintained to rectify the error by collateral attack. A court of equity must be appealed to in order that the settlement, award or judgment, as the case may be, may be first set aside.

The binding effect of compromise and settlement of claims in dispute between citizens and the Government is universally recognized.

United States *v.* Koplin, 24 Fed. (2d), 840;
United States *v.* Justice, 81 U. S. 535, 546, 549;
City of St. Louis *v.* United States, 92 U. S. 462, 466;
United States *v.* Chouteau, 102 U. S. 603, 610, 611;
Wells *v.* Nichols, 104 U. S. 444, 448;
Mason *v.* United States, 84 U. S. 67, 70;
United States *v.* Child & Co., 79 U. S. 232, 240;
United States *v.* Adams, 74 U. S. 463, 478.

In *City of St. Louis* v. *United States,* 92 U. S. 462, 466, this Court concludes its opinion with the following pertinent statement, equally applicable herein:

> "In short, we are of opinion that the deed of Carondelet is valid, as based upon an equitable compromise of a long-pending and doubtful question of title, and that it excludes the plaintiff in this suit from any relief."

Petitioner's argument is summarized in the language of the Court of Claims in the case of *Standard Steel Car Co.* v. *United States,* 60 Court of Claims 726, which arose under the Dent Act (Chapter 94, 40 Stats. 1272):

> "It is contended that the action set up in the counterclaim is not one to set aside the award made by the Secretary of War, and while it is entirely true that the relief sought is not so in terms pleaded it is sought to recover the amount, or very nearly the entire amount, two items being excepted, *awarded to the plaintiff by the Secretary of War, paid pursuant to that award, and accepted by the plaintiff in satisfaction of its claim,* and even though it be not prayed that the award be set aside, that must undoubtedly be the effect of the rendition of a judgment for the recovery

of the amount awarded and paid. *A determination of the merits of the counterclaim on the facts must necessarily involve a 'review'* (*a word found in the statute*) of the award, and if a judgment for the recovery of the money awarded and paid could be rendered without having the effect of setting aside the award, even though not so decreed in terms, the plaintiff would remain the beneficiary of an award duly accepted and paid but converted into an anomalous sort of a *nudum pactum* by the requirements that it surrender the fruits. *We cannot escape the effect of an action by contention as to the name with which we will christen* it." (Italics ours.)

The effect of permitting the Government to recover herein would be to set aside the compromise, settlement, and award of the Commission.

To permit a recovery here would also render nugatory the binding effect of the certification by the Commission under which petitioner was paid; it would take from petitioner the fruits of that decision and leave it in the position of having obtained the decision without the right to retain the advantage thereof.

CONCLUSION.

It is respectfully submitted that:

The Circuit Court of Appeals erred in construing subdivision (a) of Section 204 of the Transportation Act.

Regardless of the proper interpretation to be given to subdivision (a) of Section 204, the decision of the special tribunal to whom Congress committed the administration of this Act, is final and conclusive, and not subject to review.

The Circuit Court of Appeals erred in deciding that the Government can recover the money paid to petitioner as reimbursement and not as a subsidy or bonus. The same rule applies herein where the Government is a party as between individuals, and *ex aequo et bono* the money belongs to petitioner, and the Government should not be permitted to recover it back.

The Circuit Court of Appeals erred in deciding that the Government can disregard the compromise and settlement herein and sue for money had and received.

It is, therefore, respectfully urged that this Court reverse the decision and judgment of the Circuit Court of Appeals for the Ninth Circuit herein.

Respectfully submitted,

D. M. KELLY,
Counsel for Petitioner,
Butte, Anaconda & Pacific Railway Company,
616 Hennessy Building,
Butte, Montana.

Of Counsel:
JOHN V. DWYER,
D. G. STIVERS,
JOHN A. GROENEVELD,
Butte, Montana.
WARREN NICHOLS,
Chicago, Illinois.

CPY9059

INDEX TO APPENDIX

PUBLIC ACTS: Page

No. 242—64th Congress, H. R. 17498—An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes. (Extract) 1

No. 107—65th Congress, S. 3752—An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes. (Federal Control Act.) 6

Transportation Act, 1920. (An Act to provide for the termination of Federal control of railroads and systems of transportation; to provide for the settlement of disputes between carriers and their employees, to further amend an act entitled "An Act to regulate Commerce," approved February 4, 1887, as amended, for other purposes.) (Extracts) 21

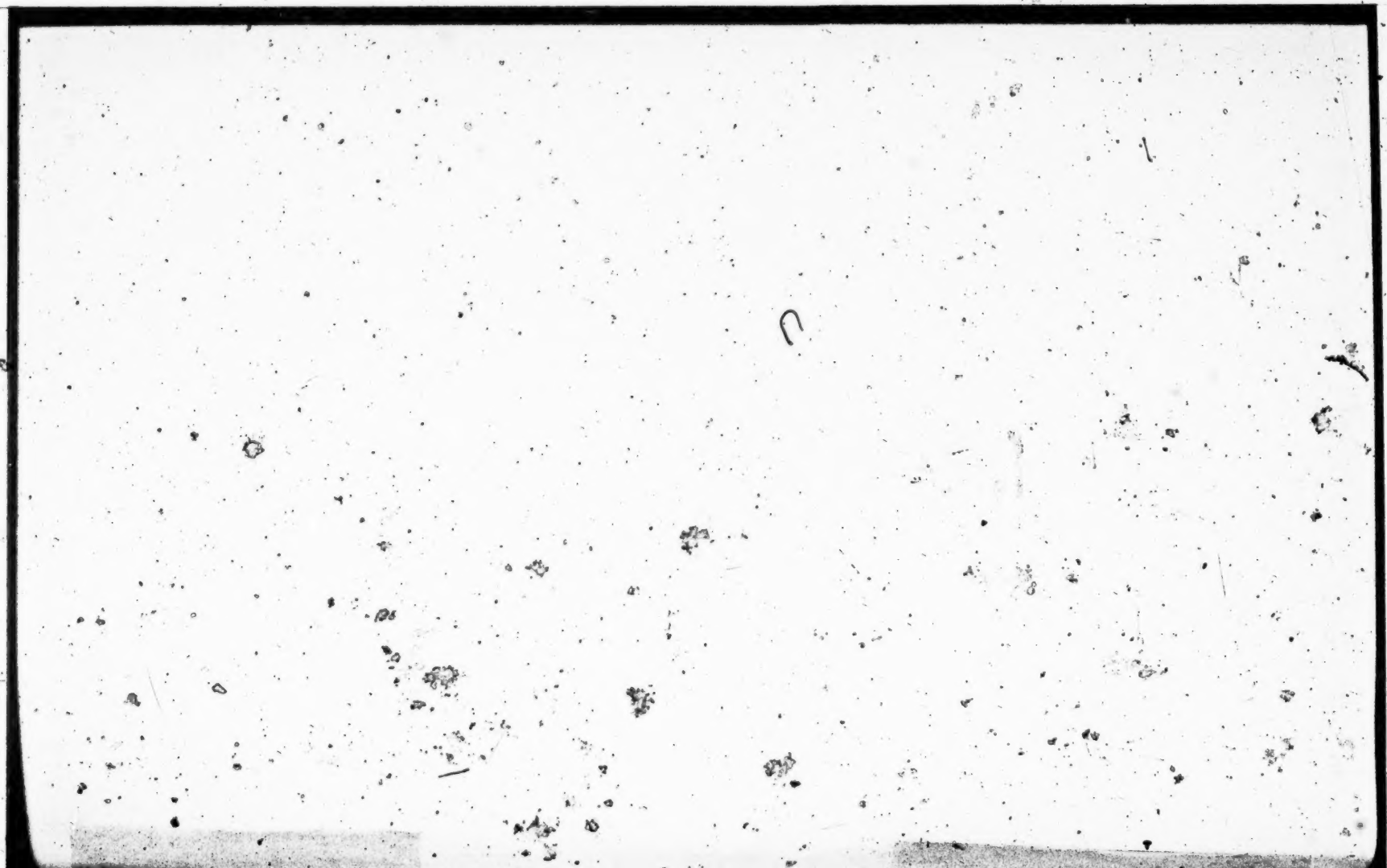
PROCLAMATIONS BY THE PRESIDENT RELATING TO THE UNITED STATES RAILROAD ADMINISTRATION:

Proclamation of December 26, 1917, taking railroads and transportation systems under Federal control, and appointing the Director General of Railroads. (Extract) 2

Statement of the President accompanying his proclamation of December 26, 1917 4

Proclamation of March 29, 1918, delegating powers under act of March 21, 1918, to Director General of Railroads 19

LEGISLATIVE ACTS AND HISTORY LEADING UP TO AND SURROUNDING PASSAGE OF TRANSPORTATION ACT, 1920 33



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.
No. 768

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA.

APPENDIX TO BRIEF OF PETITIONER BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, A CORPORATION, ON THE MERITS.

(Extract.)

(Public—No. 242—64th Congress.)

(H. R. 17498.)

An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the support of the Army for the year ending June thirtieth, nineteen hundred and seventeen. * * *

The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for

such other troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable. * * *

(Extract.)

By The President of the United States of America.

A PROCLAMATION.

* * * * * *

And whereas it has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion, as far as may be necessary, of other than war traffic thereon, for the transportation of troops, war material, and equipment therefor, and for other needful, and desirable purposes connected with the prosecution of the war;

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary War, take possession and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, including, also terminals, terminal companies, terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail-and-water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material, and equipment, to the exclusion so

far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

It is hereby directed that the possession, control, operation, and utilization of such transportation systems, hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies.

Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders general or special, hereafter made by said director shall have paramount authority and be obeyed as such.

* * * * *

The director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaran-

teed compensation above accruing depreciation and the maintenances of their properties equivalent, as nearly as may be, to the average of the net, operating income thereof for the three-year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful.

But nothing herein contained, expressed or implied, or hereafter done or suffered hereunder, shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors, and other persons having interests in said systems of transportation or in the profits thereof to receive just and adequate compensation for the use and control and operation of their property hereby assumed.

* * * * *

From and after 12 o'clock on said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice. But for the purpose of accounting said possession and control shall date from 12 o'clock midnight on December 31, 1917.

(Extract.)

Statement of the President.

I have exercised the powers over the transportation systems of the country which were granted me by the act of Congress of last August because it has become imperatively necessary for me to do so. This is a war of resources no less than of men, perhaps even more than of men, and it is necessary for the complete mobilization of our resources that the transportation systems of the country should be organized and employed under a single authority and a simplified method of coordination which have not proved possible under private management and control. The committee of railway executives who have been cooperating with the Government in this all-important matter have done the utmost that it

was possible for them to do; have done it with patriotic zeal and with great ability; but there were difficulties that they could neither escape nor neutralize. Complete unity of administration in the present circumstances involves upon occasion and at many points a serious dislocation of earnings, and the committee was, of course, without power or authority to rearrange charges or effect proper compensations and adjustments of earnings. Several roads which were willingly and with admirable public spirit accepting the orders of the committee have already suffered from these circumstances and should not be required to suffer further. In mere fairness to them the full authority of the Government must be substituted. The Government itself will thereby gain an immense increase of efficiency in the conduct of the war and of the innumerable activities upon which its successful conduct depends.

The public interest must be first served and, in addition, the financial interests of the Government and the financial interests of the railways must be brought under common direction. The financial operations of the railways need not then interfere with the borrowings of the Government, and they themselves can be conducted at a greater advantage. Investors in railway securities may rest assured that their rights and interests will be as scrupulously looked after by the Government as they could be by the directors of the several railway systems. Immediately upon the reassembling of Congress I shall recommend that these definite guarantees be given: First, of course, that the railway properties will be maintained during the period of Federal control in as good repair and as complete equipment as when taken over by the Government; and, second, that the roads shall receive a net operating income equal in each case to the average net income of the three years preceding June 30, 1917; and I am entirely confident that the Congress will be disposed in this case, as in others, to see that justice is done and full security